Supreme Court, U.S.
FILED

No. _____

97-1557 MAR 16 1998
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

October Term 1997

## SHARON MARIE PLAIN,

*Petitioner,*

v.

## SEARS ROEBUCK AND COMPANY; SEARS STORE 2755,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## Appendix to Petition for Writ of Certiorari

**Robert A. Parks**
***Counsel of Record***
**THE PARKS LAW OFFICES**
**825 Gum Branch Road**
**Jacksonville, NC 28540**
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***Counsel for Petitioner***

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153PP

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**UNPUBLISHED**
**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

SHARON MARIE PLAIN,
Plaintiff-Appellant,

v.

SEARS ROEBUCK AND COMPANY;
SEARS STORE 2755,
Defendants-Appellees.

No. 96-1486

Appeal from the United States District Court for the
Eastern District of North Carolina, at Wilmington.
James C. Fox, District Judge.

(CA-95-185-7-F)

Argued: September 29, 1997
Decided: December 15, 1997
Entered: December 15, 1997

Before RUSSELL, NIEMEYER, and MOTZ, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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**COUNSEL**

**ARGUED:** Robert Allen Parks, THE PARKS LAW OFFICES, Jacksonville, North Carolina, for Appellant. James Bernard Spears, Jr., HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Charlotte, North Carolina,

for Appellees. **ON BRIEF:** Ruth E. Parks, THE PARKS LAW OFFICES, Jacksonville, North Carolina, for Appellant. Aaron M. Christensen, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Charlotte, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

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**OPINION**

PER CURIAM:

Sharon Marie Plain appeals the district court's grant of summary udgment to Sears Roebuck and Company. We affirm.

I.

Plain began working for Sears in 1983 as a sales clerk. She was diagnosed with transverse myelitis in 1985 and pernicious anemia in 1988. In 1989, Sears promoted Plain from sales clerk to sales supervisor. Plain worked full-time as a sales supervisor until she was diagnosed with multiple sclerosis in November 1991. In 1992, Sears restructured and Plain became a sales coordinator. Although Plain attained the position of sales coordinator, she alleged that during her career with Sears, Sears systematically discriminated against her by failing to accommodate her disability in violation of the Americans With Disabilities Act of 1990 (ADA); [1] by failing to promote her because of her sex and her disability in violation of Title VII of the Civil

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[1] 42 U.S.C.A. §§ 12101-12213 (West Supp. 1995).

Rights Act of 1964 ("Title VII"),[2] and the ADA respectively; and by failing to prevent her co-workers from harassing her on the basis of her sex and disability.

Plain's complaint asserted the following events constituted the discrimination she experienced:

> (1) On March 2, 1992, her sales manager harassed her by making fun of her disability and allowed others to do likewise.
>
> (2) On August 10, 1993, another sales manager announced at a staff meeting that Plain would not be placed on a staff schedule due to her health and her doctor's recommendation.
>
> (3) She was subjected to comments that she was the first woman to work in lawn and garden.

Plain last worked for Sears on January 5, 1994. Based on her physicians' reports that she was 100% disabled and her own admissions of being unable to do any work, the Social Security Administration determined Plain had been totally and permanently disabled since that date. Three months later, on March 30, 1994, the Sears sponsored Group Long Term Disability Insurance Plan (the "Plan") concluded Plain was eligible to receive long-term disability benefits under the Plan because she could neither perform her job nor any other job for which she was qualified based on her education, training, or experience. Plain received disability benefits from both sources. She continues to receive monthly Social Security disability income. Sears removed Plain from its payrolls in April 1995.

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[2] 42 U.S.C.A. §§ 2000e-2000h-6 (West Supp. 1994).

The district court granted summary judgment to Sears finding that Plain had failed to timely file her charge of discrimination with the Equal Employment Opportunity Commission (the "EEOC"); that she failed to challenge her alleged termination in any EEOC charge; and that she was not a qualified individual under the ADA. Plain appeals.

II.

Plain contends the district court erred in finding that she had failed to timely file a charge of discrimination with the EEOC against Sears. We review de novo a district court's order granting summary judgment.[3]

Pursuant to the ADA and Title VII, Plain cannot seek redress in district court for an employer's alleged violations of either act unless she filed a charge of discrimination with the EEOC"within 180 days after the alleged unlawful employment practice occurred."[4] According to the record of evidence, Plain filed a charge of discrimination on February 13, 1995. Her charge alleged that Sears engaged in specific and non-specific instances of discriminatory conduct. The specific instances of discrimination allegedly occurred on March 2, 1992, and August 10, 1993. We hold her filing to be untimely as to both the specific and non-specific incidents of discrimination. Plain untimely filed her discrimination charge more than forty-seven months after the occurrence of the alleged first specific instance of discriminatory conduct, and more than eighteen months after the alleged ccurrence of the second specific instance of discrimination. With respect to the nonspecific instances of discriminatory conduct

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[3] **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242 (1986).

[4] 42 U.S.C.A. § 2000e-5(e)1 (West Supp. 1994); and 42 U.S.C.A. § 12117(a) (West Supp. 1994) (ADA incorporating by reference Title VII's 180 day limit within which to file charges of discrimination).

alleged in the charge, they would have had to have occurred within the 180 days preceeding her February 13, 1995, filing date. But Plain last worked for Sears on January 5, 1994, therefore, her charge filed thirteen months later was untimely. Accordingly, we find no error in the district court's determination that Plain failed to timely file an administrative charge of discrimination.

III.

Having carefully reviewed the record, briefs, and contentions of the parties at oral argument, we hold Plain's remaining contentions to be without any merit. Accordingly, we can find no error in the order and judgment of the district court, and we, therefore, affirm the judgment below.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| SHARON MARIE PLAIN, | ) |
| | ) |
| Plaintiff, | ) |
| | ) Civil Action No: |
| v. | ) 7:95-CV-185-F1 |
| | ) |
| SEARS, ROEBUCK AND CO | ) COMPLAINT AND |
| Sears Tower | ) JURY TRIAL |
| Chicago, Illinois 60684 | ) DEMANDED |
| and SEARS, Store 2755 | ) |
| Jacksonville, NC 28540 | ) |
| | ) |

ENTERED: December 22, 1995

Plaintiff, complaining of the Defendant, alleges and says:

**NATURE OF THE ACTION**

1. This is an action under Title I of the Americans With Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991, to correct unlawful employment practices on the basis of disability and to make Plaintiff whole. Defendants discharged Plaintiff, a qualified individual with disabilities (multiple sclerosis, transverse myelitis, pernicious anemia, from her position as sales clerk because of his disability.

2. Plaintiff brings this action to enforce her rights to equal employment opportunity without discrimination on the basis of sex pursuant to Title VII of the Civil Rights Act of 1964, as amended by 42 U.S.C. 2000e, et seq in the Civil Rights Act of 1991 Public Law 102-166, Stat. 1071 (1991).

## JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 107(a) of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. §1277(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 US.C. §§2000e-5(f)(1) and (3), and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. §1981(A).

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 451, 1331, 1337, 1341, and 1345. This action is authorized and instituted pursuant to Title VII of the civil Rights Act of 1964, as amended 42 U.S.C. 2000e et seq §§ 706(f)(1) and 706(f)(3).

3. The employment practices hereafter alleged to be unlawful were and are now being committed in the Eastern District of North Carolina, Civil Division.

## PARTIES

4. Plaintiff is a citizen of the United States of America and a resident of Onslow County, North Carolina. Plaintiff was an employee of the Defendants for the period from approximately September 8, 1993 until May 26, 1995.

5. Defendant, Sears, Roebuck and Company, is the parent company and Defendant, Sears of Jacksonville, is a chain store and both are "employees" within the meaning of 701(b) of Title VII and the Americans With Disabilities Act, during all time material to the averments of this complaint.

a. At all relevant times, Defendant A, Sears Roebuck, and Co., Store #2755 has been and is now a Illinois corporation doing business in North Carolina and Jacksonville, and has continuously had and does now have at least twenty-five (25) employees.

b. At all relevant times, Sears, Roebuck and Co., has been and now is a Illinois corporation which wholly owns Defendant A.

c. At all relevant time Defendant A (Store #2755) has been an agent of an Employer within the meaning of Section 101(5)(A) of the ADA, 42 U.S.C. §12115(A).

d. At all relevant times, Defendants A and B have continuously been engaged in an industry affecting commerce within the meaning of Section 101(5) of the ADA, 42 U.S.C. §12111(5), and Section 107(7) of the ADA, 42 U.S.C. §12117(7), which incorporates by reference Sections 701(g) and (h) of Title VII, 42 U.S.C. §20002(g) and (h).

e. At all relevant times, Defendants A and B have been a covered entity under Section 101(2) of the ADA, 42 U.S.C. §12111(2).

**ADMINISTRATIVE PROCEDURES**

6. Plaintiff timely filed a charge of discrimination against the Defendants while the Equal Employment Opportunity Commission on or about February, 1994. EEOC Charge No. 141950278.

7. On or about September 25, 1995, the EEOC issued a determination concluded "that the charging party (Plaintiff herein) was not discriminated against by Sears.

8. On or about September 28, 1995, the Plaintiff received from EEOC a letter dated September 25, 1995, advising Plaintiff that she had the right to institute civil action in the United States District Court.

9. Plaintiff has satisfied all private, administrative and judicial prerequisites to the institution of this action.

## FACTS GIVING RISE TO THE CLAIM

10. At the time of the facts giving rise to this lawsuit, Plaintiff, Ms. Plain, was an employee at Sears, Store #2755, in the position of Sales/Supervisor.

11. On March 2, 1992, Plaintiff was subjected to harassment by David Parker, Sales Manager. The basis of his harassment was that he made fun of Plaintiff's multiple sclerosis conduct and allowed other people to make fun of Plaintiff.

12. On or about August 10, 1993, Doug Turner, Store Manger, announced at a meeting to the other employees that Plaintiff would not be placed on a staff schedule due to health and her doctor's recommendation, which embarrassed Plaintiff.

13. Plaintiff was never given an opportunity or reasonably accommodated to work in other positions.

14. Plaintiff was subjected to comments about the fact that she was the first woman to work in lawn and garden.

15. From 1992 to the present date, Sears, through their store managers, has engaged in a pattern and practice of sex and disability discrimination which forced me out of the promotion pattern. Defendants actions in this case are consistent with that practice.

16. Plaintiff believes the actions of the Defendant, Sears (through its agents Turner and Parker) were unjust and discriminatory on the basis of disability and sex due to the act that numerous other male employees similarly situated to Plaintiff were given promotions with less seniority. Indeed, in some instances theses male employees who were similarly situated directly benefited from the lack of a uniform and equitable promotion procedure.

17. Plaintiff believes that actions taken by Defendant, Sears through its managers, Turner and Parker, were a direct result of sex and disability discrimination when

she was terminated on or about April 28, 1995 by failure of Defendant, Sears, to reasonably accommodate Plaintiff.

18. More than thirty (30) days prior to the institution of this lawsuit, Plaintiff filed a Charge with the Commission alleging violation of Title I of the ADA by Defendants A and B. All conditions precedent to the institution of this lawsuit have been fulfilled.

19. Since at least March 2, 1992, Defendants have engaged in unlawful employment practices in violation of the ADA Sections 102(a), 102(b)(1) and 102(b)(5), 42 U.S.C. §§12112(a), 12112(b)(1) and 12112(b)(5)(B), at their Jacksonville facility. These practices include but are not limited to Defendants' discharge of Plaintiff, a qualified individual with a disability, who was able to perform the essential function of her position with or without reasonable accommodation, because of her disability, multiple sclerosis, transverse myelitis, pernicious anemia, and Defendants' discharge of Plaintiff based on the need to make reasonable accommodations to her possible future physical impairments.

20. The effect of the practices complained of above has to deprive Plaintiff of equal employment opportunities and otherwise adversely affect her status as an employee because of her disabilities.

21. The unlawful employment practices complained of above were and are intentional.

**PRAYER FOR RELIEF**

22. In view of the foregoing, Plaintiff, Sharon M. Plain, respectfully prays that this Court:

A. Grant a permanent injunction enjoining Sears, its owners, officers, management personnel, employees, agents, successors, assigns; active concert or participation with them, from engaging in any employment practice which discriminates on basis of disability;

B. Order Defendants A and B to institute and carry our policies, practices, and programs which provide

equal employment opportunities to qualified individuals with disabilities, and which eradicate the effects of past and present unlawful practices;

C. Order Defendants A and B to make whole Plaintiff by providing her with appropriate lost earnings and insurance premiums, with pre-judgement interest, in amounts to be proved at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices;

D. Order Defendants A and B to make whole Plaintiff by providing compensation for pecuniary losses, including by not limited to costs to be incurred for health and life insurance premiums in amounts to be determined at trial;

E. Liquidated damages to include punitive damages; and

F. Plaintiff requests a trial by jury.

Respectfully submitted, this the 22nd day of December, 1995.

/s/ Sharon M. Plain
Sharon M. Plain
102 Berkshire Drive
Jacksonville, NC 28546-8403

NORTH CAROLINA
ONSLOW COUNTY

SHARON M. PLAIN, being first duly sworn, deposes and says: documents are true to the best of my knowledge and belief, except for those allegations set forth upon information and belief, and as to those allegations, I believe them to be true.

/s/ SHARON M. PLAIN
SHARON M. PLAIN

SUBSCRIBED AND SWORN to before me this 22nd day of December, 1995.

/s/ GERRI L. JOHNSON
NOTARY PUBLIC
My commission expires:
9-16-98

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| SHARON MARIE PLAIN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action No: |
| v. | ) | 7:95-CV-185-F |
| | ) | |
| | ) | |
| SEARS, ROEBUCK AND CO. | ) | |
| Sears Tower | ) | |
| Chicago, Illinois 60684 | ) | |
| and SEARS, Store 2755 | ) | |
| Jacksonville, NC 28540 | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

ENTERED: February 2, 1996

**DEFENDANT'S MOTION TO DISMISS**

Defendant Sears Roebuck and Co., by and through its counsel, moves pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiff's claims under the Americans with Disabilities Act and Title VII of the 1964 Civil Rights Act. Defendant submits that dismissal is proper for the following reasons:

1. Plaintiff did not file an administrative Charge of Discrimination challenging her termination under the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. §12101, et seq. or Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.

2. Plaintiff did not file a timely administrative charge of discrimination challenging the alleged denial of accommodation, harassment, and promotion.

3. Plaintiff is not a qualified individual with a disability under the Americans with Disabilities Act.

This motion is supported by the affidavits of Lois Worrell and Ronda Austin. Defendant has also concurrently filed its supporting memorandum.

Dated this the 1st day of February, 1996.

Respectfully submitted,

James B. Spears, Jr.
/s/ Aaron M. Christensen
Aaron M. Christensen

HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.
Federal Plaza Building
400 West Trade Street
Charlotte, NC 28202

(704) 342-2588
Counsel for Sears, Roebuck & Co.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| SHARON MARIE PLAIN,<br><br>Plaintiff,<br><br>v.<br><br>SEARS, ROEBUCK AND CO.<br>Sears Tower<br>Chicago, Illinois 60684<br>and SEARS, Store 2755<br>Jacksonville, NC 28540<br><br>Defendants. | ) | Civil Action No:<br>7:95-CV-185-F |

**DEFENDANT'S MOTION TO DISMISS**

**ATTACHMENT A**

**EEOC CHARGE AND NOTICE**

**CHARGE OF DISCRIMINATION**

This Form Is Affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY☐ FEPA☒ EEOC

CHARGE NUMBER
141950278

_____ and EEOC
State or local Agency, if any

NAME (*Indicate Mr., Ms., Mrs.)*
Ms. Sharon M. Plain

HOME TELEPHONE *(Indicate Area Code)*
(910) 353-8768

STREET ADDRESS
102 Berkshire Drive

CITY, STATE AND ZIP CODE
Jacksonville, NC 28546

DATE OF BIRTH
01/28/61

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below.)*

NAME
Sears #2755

NUMBER OF EMPLOYEES, MEMBERS
Cat C (201-500)

TELEPHONE *(Include area code)*
(910) 353-2223

STREET ADDRESS
Country Club Rd.

CITY, STATE AND ZIP CODE
Jacksonville, NC 28546

COUNTY
199

NAME

TELEPHONE NUMBER *(Include Area Code.)*

STREET ADDRESS

CITY, STATE AND ZIP CODE COUNTY

CAUSE OF DISCRIMINATION BASED ON
*(Check appropriate box(es)*

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION
☐ NATIONAL ORIGIN ☐ RETALIATION ☐ AGE
☒ DISABILITY ☐ OTHER *(Specify)*

DATE DISCRIMINATION TOOK PLACE

| *EARLIEST* | *LATEST* |
|---|---|
| 03/02/92 | 07/02/94 |

CONTINUING ACTION THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I was hired by the above company in 1983 as a sales clerk. I progressed to the position of Sales Supervisor which was later reclassified to Sales Coordinator. During my employment I was denied a reasonable accommodation, harassed, and denied a promotion because of my disabilities and sex.

Management officials told me that I was not going to be placed on the "Staff Schedule" because of my inflexible schedule and health. I was told by the store manager that if I could not work a regular schedule release from my doctor to work a regular schedule that he did not know what he could do for me; He demanded I get a release from my doctor to work a regular schedule. It was also indicated that I would not advance due to my health. I was not given a reason for the harassment and promotion denial.

I believe I am the victim of discrimination based on my disabilities in violation of Title I of the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964, as amended.

□ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY (When necessary for state and Local Requirements)

---

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Date Charging Party *(Signature)*

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE

(Day, Month, and Year)

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

Mr. Michael Bass
National Mgr./Field Human Reso
Sears Merchandise Group
3333 Beverly Road
Hoffman Estates, IL 60179

PERSON FILING CHARGE
Plain, Sharon M

THIS PERSON (check one)
☒ CLAIMS TO BE AGGRIEVED
☐ IS FILING ON BEHALF OF ANOTHER

DATE OF ALLEGED VIOLATION

| *Earliest* | *Most Recent* |
|---|---|
| *03/02/92* | *07/02/94* |

PLACE OF ALLEGED VIOLATION
Jacksonville, NC

CHARGE NUMBER
141950278

NOTICE OF CHARGE OF DISCRIMINATION

*(See EEOC "Rules and Regulations" before completing this form.)*

You are hereby notified that a charge of employment discrimination has been filed against your organization under:

☒ TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

☐ THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

☒ THE AMERICANS WITH DISABILITIES ACT

☐ THE EQUAL PAY ACT (29 U.S.C., SECT. 206(d) investigation will be conducted concurrently with out investigation of this charge.

The boxes checked below apply to your organization:

1. ☐ No action is required on your part at this time.

2. ☒ Please submit by 03/21/95 a statement of your position with respect to the allegation(s) contained in this charge, with copies of any supporting documentation. This material will be made a part of the file and will be considered at the time that we investigate this charge. Your prompt response to this request will make it easier to conduct and conclude our investigation of this charge.

3. ☒ Please respond fully by 03/21/95 to the attached request for information which pertains to the allegation contained in this charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation of the charge.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Charlotte District Office
5500 Central Avenue
Charlotte, NC 28212-2799

Velmer Buxton, Supervisor
*(Commission Representative)*

(704) 567-7100
*(Telephone Number)*

☒ Enclosure: Copy of Charge

BASIS OF DISCRIMINATION

☐ RACE ☐ COLOR ☒SEX ☐ RELIGION
☐ NAT. ORIGIN ☐ AGE ☒ DISABILITY
☐ RETALIATION ☐ OTHER

CIRCUMSTANCES OF ALLEGED VIOLATION

See enclosed Form 5, Charge of Discrimination.

DATE 02/21/95

TYPED NAME/TITLE OF AUTHORIZED EEOC OFFICIAL

Marsha J. Drane, Director

SIGNATURE
/s/ Marsha J. Drane

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| SHARON MARIE PLAIN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action No: |
| | ) | 7:95-CV-185-F |
| v. | ) | |
| | ) | |
| SEARS, ROEBUCK AND CO. | ) | |
| Sears Tower | ) | |
| Chicago, Illinois 60684 | ) | |
| and SEARS, Store 2755 | ) | |
| Jacksonville, NC 28540 | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**DEFENDANT'S MOTION TO DISMISS**

**ATTACHMENT B**

**AFFIDAVIT OF LOIS WORRELL**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| SHARON MARIE PLAIN,<br><br>Plaintiff,<br><br>v.<br><br>SEARS, ROEBUCK AND CO.<br>Sears Tower<br>Chicago, Illinois 60684<br>and SEARS, Store 2755<br>Jacksonville, NC 28540<br><br>Defendants. | ) Civil Action No:<br>) 7:95-CV-185-F |

| | |
|---|---|
| STATE OF NORTH CAROLINA | ) |
| | ) AFFIDAVIT |
| COUNTY OF ONSLOW | ) OF LOIS WORRELL |

Personally appeared before me Lois Worrell, who, upon oath duly sworn, states as follows:

1. My name is Lois Worrell and I am employed by Sears, Roebuck & Co. in the Company's Jacksonville, North Carolina retail store.

2. I am responsible for Human Resource functions in the Company's Jacksonville, North Carolina retail store. For example, I am responsible for maintaining business records relating to attendance and leaves of absence.

3. I am familiar with the employment records of Ms. Sharon Plain. Ms. Plain was employed by the Company as a Sales Supervisor in the Company's Jacksonville, North

Carolina retail store. Ms. Plain's last day of work at the Sears, Roebuck and Co. retail store in Jacksonville, North Carolina was January 5, 1994.

4. This affidavit is based on my personal knowledge. All of my statements are true and correct to the best of my knowledge. I have given this affidavit freely and voluntarily.

/s/ Lois Worrell
Lois Worrell

Sworn to and subscribed before me
this the 31st day of Jan, 1996.
/s/ M. Andy Ful
Notary Public

My commission expires:

MY COMMISSION EXPIRES 9-29-96.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| SHARON MARIE PLAIN,<br><br>Plaintiff,<br><br>v.<br><br>SEARS, ROEBUCK AND CO.<br>Sears Tower<br>Chicago, Illinois 60684<br>and SEARS, Store 2755<br>Jacksonville, NC 28540<br><br>Defendants. | Civil Action No:<br>7:95-CV-185-F |

**DEFENDANT'S MOTION TO DISMISS**

**ATTACHMENT C**

**AFFIDAVIT OF RONDA AUSTIN**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| SHARON MARIE PLAIN,<br><br>Plaintiff,<br><br>v.<br><br>SEARS, ROEBUCK AND CO.<br>Sears Tower<br>Chicago, Illinois 60684<br>and SEARS, Store 2755<br>Jacksonville, NC 28540<br><br>Defendants. | ) Civil Action No:<br>) 7:95-CV-185-F |
| STATE OF NEW YORK<br><br>COUNTY OF ONEIDA | ) AFFIDAVIT OF<br>) RONDA AUSTIN |

Personally appeared before me Ronda Austin, who, upon oath duly sworn, states as follows:

1. My name is Ronda Austin. I am employed by Met Life/Met Disability as the Unit Manager of the Disability Claims Section.

2. I am responsible for all records pertaining to disability claims and coverage including the records relating to an application for disability benefits for Ms. Sharon M. Plain.

3. Ms. Plain's attorney sent Met Life/Met Disability a copy of Ms. Plain's application for Social Security disability benefits. A copy of the application is attached as Exhibit A

to this Affidavit. (Exhibit A, Social Security Disability Report.)

4. Attached as Exhibit B to this Affidavit is a copy of the award letter sent to Met Life/Met Disability by Ms. Plain's attorney. The letter indicates that Ms. Plain was awarded Social Security disability benefits. (Exhibit B, SSA award letter.)

5. Ms. Plain applied for the long-term disability benefits available under the disability plan sponsored by Sears, Roebuck and Co. A copy of Ms. Plain's application is attached as Exhibit C to this Affidavit. (Exhibit C, Claimant's Statement of LTD Claim.)

6. Sears, Roebuck & Co. filed a statement relating to Ms. Plain's application for long-term disability benefits. A copy of the employer's statement is attached as Exhibit D to this Affidavit. (Exhibit D, Employer's Statement of LTD Claim.)

7. Met Life/Met Disability approved Ms. Plain's application for long-term disability benefits. Attached as Exhibit E to this Affidavit is a copy of the letter that Met Life/Met Disability sent to Ms. Plain regarding her approval for benefits. (Attachment E, Letter of Approval.)

8. I have given this Affidavit freely and voluntarily. The statements contained in this Affidavit are my own and are true to the best of my knowledge. This Affidavit is based on my personal knowledge.

/s/ Ronda S. Austin
Ronda Austin

Sworn to and subscribed before me
this 30th day of January, 1996.

/s/ J. Gregory Bonaros
NOTARY PUBLIC

My Commission Expires: _____
J. Gregory Bonaros
Notary Public, State of New York
Commissioned in Oneida County

My Commission Expires August 22, 1996

**DEFENDANT'S MOTION TO DISMISS**

**EXHIBIT A**

**SOCIAL SECURITY DISABILITY REPORT**

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Form Approved

Social Security Administration OMB No. 0960-0141

**DISABILITY REPORT**

PLEASE PRINT, TYPE, OR WRITE CLEARLY AND ANSWER ALL ITEMS TO THE BEST OF YOUR ABILITY. If you are filing on behalf of someone else, enter his or her name and social security number in the space provided and answer all questions. COMPLETE ANSWERS WILL AID IN PROCESSING THE CLAIM.

PRIVACY ACT/PAPERWORK REDUCTION AT NOTICE: The Social Security Administration is authorized to collect the information on this form under sections 205(a), 223(a) of the Social Security Act. The information on this form is needed by Social Security to make a decision on your claim. While giving us the information on this form is voluntary, failure to provide all or part of the requested information could prevent an accurate or timely decision on your claim and could result in the loss of benefits. Although the information you furnish on this form is almost never used for any purpose other than making a determination on you disability claim, such information may be disclosed by the Social Security Administration as follows: (1) To enable a third party or agency to assist Social Security in establishing rights to Social Security benefits and/or coverage; (2) to comply with Federal laws requiring release of information from Social Security records (e.g. to the General Accounting Office and the Veterans Administration); and (3) to facilitate statistical research and audit activities necessary to assure the integrity and Improvement of the Social Security programs (e.g. to the Bureau of the Census and private concerns under contract to Social Security). These and other reasons why

Information about you may be used or given out are explained in the Federal Register. If you would like more information about this, any Social Security office can assist you.

A. NAME OF CLAIMANT
SHARON M. PLAIN

B. SOCIAL SECURITY NUMBER
243 / 11/ 2932

C. TELEPHONE NUMBER where you can be reached (include area code)
(910) 353-8768

D. WHAT IS YOUR DISABLING CONDITION? *(Briefly explain the injury or illness that stops you from working.)*

Multiple Sclerosis; Carpal Tunnel Syndrome in both hands, bowel and eye complications from MS

PART I - INFORMATION ABOUT YOUR CONDITION

1. When did your condition first bother you:

| MONTH | DAY | YEAR |
|---|---|---|
| | | 1985 |

2A. Did you work after the date shown in item 1? *(If "no", go on to Items 3A and 3B.)*

☒ YES ☐ NO

2B. If you did work since the date in item 1, did your condition cause you to change —

Your job or job duties? ☐ YES ☒ NO

| | | |
|---|---|---|
| Your hours of work? | ☒ YES | ☐ NO |
| Your attendance? | ☒ YES | ☐ NO |
| Anything else about your work? | ☐ YES | ☒ NO |

(If you answered "no" to all of these, go to items 3A and 3B.)

2C. If you answered "yes" to any item in 2B, explain below what the changes in your work circumstances were, the dates they occurred, and how your condition made these changes necessary.

In 1991 stopped working 60 hours per week, and dropped to 40 hours.

In 1991 started missing work; Dr. Ballenger wrote excuses.

3A. When did your condition finally make you stop working?

| MONTH | DAY | YEAR |
|---|---|---|
| January | 6 | 1994 |

3B. Explain how your condition now keeps you from working.

Hurt/ache across back from neck down to lower back with intermittent sharp pains going up back like a knife; hips and legs hurt because gait is out of whack (the the hurt down the hips and legs is a tingling numbness); feet and hands are numb; even wearing clothes hurts at times; eyes blur and at times cannot distinguish letters, numbers and have difficulty with reading comprehension at times.

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[Handwritten] Neurologist told me I was 100% disabled and should stop working.

PART II - INFORMATION ABOUT YOUR MEDICAL RECORDS

4. List the name, address and telephone number of the doctor who has the latest medical records about your disabling condition.

If you have no doctor check ☐

NAME
Clarene E. Ballenger, III, M.D.

ADDRESS
227 Memorial Drive
Jacksonville, NC 28540

TELEPHONE NUMBER (include area code)
(910) 353-3624

HOW OFTEN DO YOU SEE THIS DOCTOR?
at least every 2 weeks

DATE YOU FIRST SAW THIS DOCTOR
Nov. 1991

DATE YOU LAST SAW THIS DOCTOR
Jan 27, 1994

REASONS FOR VISITS *(shot illness or injury for which you had an examination or treatment)*

This doctor treats my M.S.

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines show "NONE".)

Medications; Cylert, Zantac, Visaril, Diazepam, Darvocet, Every few months I take IV Methylplednisone treatment

5A. Have you seen any other doctors since your disabling condition began?
*If "yes", show the following:* ☒ YES ☐ NO

NAME
Hong Y. Chung, M.D.

ADDRESS
231 Memorial Drive
P.O. Box 12134
Jacksonville, NC 28540

TELEPHONE NUMBER (includearea code)
(910) 353-2800

HOW OFTEN DO YOU SEE THIS DOCTOR?
whenever I have colds, flu, etc

DATE YOU FIRST SAW THIS DOCTOR
1986

DATE YOU LAST SAW THIS DOCTOR

REASONS FOR VISITS *(shot illness or injury for which you had an examination or treatment)*

This is my general practitioner

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines show "NONE".)

no regular treatment

5B. Identify below any other doctor you have seen since your illness or injury began.

HOW OFTEN TO YOU SEE THIS DOCTOR?

DATE YOU FIRST SAW THIS DOCTOR

DATE YOU LAST SAW THIS DOCTOR

REASONS FOR VISITS (show illness or injury for which you had an examination or treatment.)

treated for bowel complications concerning M.S. Dr. Issa is gastroenterologist

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines show "NONE".)

had colonoscopy; he prescribes colace; Litrycil; hemmorhoidal JC Suppositories as needed; Xylocame (liguis)

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6A. Have you been hospitalized or treated at a clinic for your disabling condition? *If "yes", show the following:*

☒ YES ☐ NO

NAME OF HOSPITAL OR CLINIC
Onslow Memorial Hospital

ADDRESS
Jacksonville, NC

PATIENT OR CLINIC NUMBER
Jacksonville, NC

WERE YOU AN INPATIENT? (stayed at least overnight?)

☐ YES ☐ NO (if "yes", show:)

WERE OU AN OUTPATIENT?

☒ YES ☐ NO (if "yes", show:)

DATES OF ADMISSIONS

DATES OF DISCHARGES

DATES OF VISITS

last ones in JAN - 1994

REASON FOR HOSPITALIZATION OR CLINIC VISITS (show illness or injury for which you had an examination or treatment.)

go periodically for IV Methylprednisone; for colonoscopy

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

[see above]

6B. If you have been in other hospital or clinic for your illness or injury, identify it below.

NAME OF HOSPITAL OR CLINIC
Craven Regional Medical Center

PATIENT OR CLINIC NUMBER

ADDRESS
Neuse Blvd
New Bern, NC

WERE YOU AN INPATIENT? (stayed at least overnight?)

☐ YES ☐ NO (if "yes", show:)

WERE YOU AN OUTPATIENT?
☒ YES ☐ NO (if "yes", show:)

DATES OF ADMISSIONS DATES OF DISCHARGES

DATES OF VISITS
1991

REASON FOR HOSPITALIZATION OR CLINIC VISITS (show illness or injury for which you had an examination or treatment.)

spinal tap; and neurological testing per Dr. Ballenger.

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

If you have been in other hospitals or clinics for your illness injury, list the names, addresses, patient or clinic numbers, dates and reasons for hospitalization or clinic visits in Part VI.

7. Have you been seen by other agencies for your disabling conditions? (VA, Workmen's Compensation, Vocational Rehabilitation, Welfare, etc.)

☐ YES ☒ NO
(If "yes. show the following:)

NAME OF AGENCY

ADDRESS

YOUR CLAIM NUMBER

ADDRESS
DATE OF VISITS

TYPE OF TREATMENT, EXAMINATION OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

8. Have you had any of the following tests in the last year?

TEST CHECK APPROPRIATE BLOCK OR BLOCKS
IF "YES" WHERE DONE SHOW WHEN DONE

Electrocardiogram ☐ YES ☒ NO

Chest X-Ray ☐ YES ☒ NO

Other X-Ray (name body part here) ☐ YES ☒ NO

Breathing Tests ☐ YES ☐ NO

Blood Tests -- Dr. Ballenger ☒ YES ☐ NO
Dr. Ballenger's office and Onslow Mem Hosp
(uncertain of date)

Other (Specify) -- Colonoscopy
Dr. Beam - Dr.Ballenger ☒ YES ☐ NO
Dr. Ballenger's office
Onslow Memorial Hosp
Feb 4 1994
July 30

9. If you have a Medicaid card, what is your number (some hospitals and clinics file your records by your Medicaid number.)

PART III - INFORMATION ABOUT YOUR ACTIVITIES

10. Has your doctor told you to cut back or limit your activities in any way? ☒ YES ☐ NO

If "yes", give the name of the doctor below and tell what he or she told you about cutting back or limiting your activities.

Dr. Ballenger told me on 1/6/94 that because of the severity of my M.S., I was 100% disabled and should not work.

11. Describe your daily activities in the following areas and state what and how much you do of each and how often you do it: Household maintenance (including cooking, cleaning, shopping, and odd jobs around the house as well as any other similar activities):

Live with parents. I rarely clean, cook because of pain and fatigue

.

- Recreational activities and hobbies (hunting, fishing, bowling, hiking, musical instruments, etc.):

Go to M.S. support group once monthly. Gave up hobbies back in 1985 — found I did not have hand control to continue cake decorating, knitting

- Social contacts (visits with friends, relatives, neighbors):

M.S. support group. Friends don't drop in because I sleep a lot.

- Other (drive care, motorcycle, ride bus, etc.)

Drive only with someone with me because I have a problem moving right foot from gas to brake and have problems with

eyesight and changing lanes. Started having someone come with me in 1991.

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PART IV - INFORMATION ABOUT YOUR EDUCATION

12. What is the highest grade of school that you completed and when?

HS grad - 1979 2 yr assoc degree

13. Have you gone to trade or vocational school or had any type of special training ? If "yes", show:

☐ YES ☒ NO

The type of trade or vocational school or training:

- 2 yr ssoc Degree - Elem. Ed.

Approximate dates you attended: 79-81

- How this schooling or training was used in a any work you did:

Did not use this training in work done.

PART V - INFORMATION ABOUT THE WORK YOU DID

14. List all jobs you have had in the last 15 years before you stopped working, beginning with your usual job. Normally, this will be the kind of work you did the longest. (If you have a 6th grade education or less; AND did only heavy unskilled labor for 35 years or more, list all of the jobs you have had since you began to work. If you need more space, use Part VI.)

JOB TITLE
Sales Coordinator (Mgt)

TYPE OF BUSINESS
Sear 89-94

DATES FROM - DATES TO
9/83 - 1/94

DAYS PER WEEK
6

RATE OF PAY(Per hour, day, week, month or year)

$3.60 –83

JOB TITLE
Commissioned Salesperson

TYPE OF BUSINESS

DATES FROM - DATES TO
Feb 94 to 1989

DAYS PER WEEK

RATE OF PAY(Per hour, day, week, month or year)
$8.38

JOB TITLE
Sales Clerk - Lingerie

TYPE OF BUSINESS

DATES FROM - DATES TO
9/83-2/84

DAYS PER WEEK

RATE OF PAY(Per hour, day, week, month or year)

JOB TITLE
Telephone Soliciting

TYPE OF BUSINESS
Billy Mills Insurance

DATES FROM - DATES TO
3/83

DAYS PER WEEK
9/83

RATE OF PAY(Per hour, day, week, month or year)

| JOB TITLE | TYPE OF BUSINESS |
|---|---|
| Santa's Elf | Jacksonville Mall |
| **DATES FROM - DATES TO** | **DAYS PER WEEK** |
| 11/81 | 12/24/81 |

RATE OF PAY(Per hour, day, week, month or year)

15A. Provide the following information for your usual job shown in item 14, line 1.

In your job did you:

- Use machines, tools, or equipment of any kind? ☒ YES ☐ NO
- Use technical knowledge or skills? ☒ YES ☐ NO
- Do any writing, complete reports or perform similar duties? ☒ YES ☐ NO
- Have supervisory responsibilities? ☒ YES ☐ NO

15B. Describe your basic duties (explain what you did and how you did it) below. Also, explain all "Yes" answers by giving a FULL DESCRIPTION of the types of machines, tools, or equipment you used and the exact operation you performed; the technical knowledge of skills involved; the type of writing you did, and the nature of any reports; and the number of people you supervised and the extent of your supervision:

① Tools/Machines: computers to order merchandise; send/receive E-Mail; check inventory. had to know about the tools in Hardware dept. Had to sell tools.
② Technical knowledge; supervising skills in addition to above plus selling skills.

③ Writing: schedules for employees; deficiencies, reports on employees; notes to employer
④ Supervisory: between 32 employees to 10 employees for telephone soliciting - used phone, too.

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15C. Describe the kind and amount of physical activity this job involved during typical day in terms of:

- Walking (circle the number of hours a day spent walking) — 0 1 2 3 4 5 6 7 ⑧
- Standing (circle the number of hours a day spent standing) — 0 1 2 3 4 5 6 7 ⑧
- Sitting (circle the number of hours a day spent sitting) — ©1 2 3 4 5 6 7 8
- Bending (circle how often a day you had to bend) — Never - Occasionally - Frequently - Constantly
- Reaching (circle how often a day you had to reach) — Never - Occasionally - Frequently - Constantly
- Lifting and Carrying: Describe below what was lifted, and how far it was carried. Check heaviest weight lifted, and weight frequently lifted and/or carried:

HEAVIEST WEIGHT LIFTED

- ☐ 10 lbs.
- ☒ 20 lbs. — could not lift more than
- ☐ 50 lbs. 20 lbs
- ☐ 100 lbs.
- ☐ Over 100 lbs.

HEAVIEST WEIGHT LIFTED

- ☒ Up to 10s.
- ☐ Up to 25 lbs.
- ☐ Up to 50 lbs.
- ☐ Over 50 lbs.

## PART VI — REMARKS

Use this section for additional space to answer any previous questions. Also use this space to give any additional information that you think will be helpful in making a decision in your disability claim, (such as information about other illnesses or injuries not shown in Parts I and II.) Please refer to the previous items by number.

4. Dr. Russell Barnes -- last seen in 1985 for first symptoms of M.S. (910) 353-2115. 200 Memorial Drive, Jacksonville, NC 28546

Dr. Gregory Cobb (deceased opthamologist) memorial Dr. Jacksonville (records attached)

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Social Security Administration ATTN: Reports Clearance Officer, 1-A-21 Operations Bldg., Baltimore, MD 21235 and to the Office of Management and Budget, Paperwork Reduction Project (OMB #0950-0141), Washington, D.C. 20503.

Knowing that anyone making a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law, I certify that the above statements are true.

NAME (Signature of claimant or person filing on the claimant's behalf)

SIGN HERE➤ DATE

Witnesses are required ONLY if this statement has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the person making the statement must sign below, giving their full addresses.

1. Signature of Witness

Address (Number and street, city, state, and ZIP code)

2. Signature of Witness

Address (Number and street, city, state, and ZIP code)

Plain v. Sears, Roebuck & Co.
C.A. No: 7:95-CV-185-F1

**DEFENDANT'S MOTION TO DISMISS**

**EXHIBIT B**

**SSA AWARD LETTER**

Social Security Administration
Retirement, Survivors, and Disability Insurance
Copy of Award
Office of Disability and International Operations
1500 Woodlawn Drive
Baltimore, Maryland 21241

Date:

Claim Number: 243-11-2932

Sharon M. Plain
102 Berkshire Dr
Jacksonville, NC 28546

You are entitled to monthly disability benefits beginning July 1994.

The Date You Became Disabled

We found that you became disabled under our rules on January 5, 1994.

However, you have to be disabled for 5 full calendar months in a row before you can be entitled to benefits. For this reason, your first month of entitlement to benefits is July 1994.

What We Will Pay And When

You will receive $76,300 for July 1994 around August 3, 1984.

After that you will receive $76,300.00 each month.

These and any future payments will go to the financial institution you selected. Please let us know if you change your mailing address, so we can send you letters directly.

Other Social Security Benefits

The benefit described in this letter is the only one you can receive from Social Security. If you think that you might qualify for another kind Social Security benefit in the future, you will have to file another application.

Do You Disagree With The Decision?

If you think we are wrong, you have the right to appeal. A person who did not make the first decision will decide your case. We will correct any mistakes. We will review those parts of the decision which you believe are wrong and will look at any new facts you have. We may also review those parts which you believe are correct and may make them favorable or less favorable to you.

*You have 60 days to ask for appeal.

*The 60 days start the day after you receive this letter.

* You must have a good reason if you wait more than 60 days to ask for an appeal.

Things to Remember For The Future

For you to be considered disabled under our rules, your health problems must keep you from doing not only you have usual work, but also any other kind of substantial gainful work.

Also, you must meet this requirement at the same time when you have earned enough credits for work under Social Security. The last date when you will have earned enough credits is December 1998.

Please read the enclosed pamphlet, "How You Earn Social Security Credits," which explains how the credits are earned and how many a person needs to receive benefits.

Your Responsibilities

you is due disability benefits because you are expected to be disabled under our rules for at least 5 full calendar months. Therefore, you should let us know if your health improves or you are able to return to work.

The decision we made on your claim is based on information you gave us. If this information changes, it could affect your benefits. For this reason, it is important that you report changes to us right away.

We have enclosed a pamphlet, "When You Get Social Security Disability Benefits...What You Need To Know." It

will tell you what must be reported and how to report. Please be sure to read the parts of the pamphlet which explain what to do if you go to work of if your health improves.

Other Information

We are sending a coy of this notice to Mary C. Higgins.

If You Want Help With Your Appeal

You can have a friend, lawyer or someone else help you. There are groups that can help you find a lawyer or give you free legal services if you qualify. There are also lawyers who do not charge unless you win your appeal. Your local Social Security office has a list of groups that can help you with your appeal.

If you get someone to help you, you should let us know. If you hire someone, we must approve the fee before he or she can collect it. And if you hire a lawyer, we will withhold up to 25 percent of any past due benefits to pay toward the fee.

If You Have Any Questions

If you have any questions, you may call us toll-free at 1-800-772-1212, or call your local Social Security office at 1-919-637-1703. We can answer most questions over the phone. You can also write or visit any Social Security office. The office that serves your area is located at:

District Office
2822 Neuse Blvd
New Bern, NC 28562

If you do call or visit an office, please have this letter with you. It will help us answer your questions. Also if you plan to visit an office, you may call ahead to make an appointment. This will help us serve you more quickly when you arrive at the office.

/s/ Shirley S. Chater
Shirley S. Chater
Commissioner of Social Security

Enclosure(s):
SSA Pub No 05-10153
SSA Pub No 05-10072

Plain v. Sears, Roebuck & Co.
C.A. No. 7:95-185-F1

**DEFENDANT'S MOTION TO DISMISS**

**EXHIBIT C**

**CLAIMANT'S STATEMENT OF LTD CLAIM**

SEARS CLAIMANT'S STATEMENT OF LTD CLAIM METLIFE

Page one must be completed by the claimant. After completing pages 1 and 4, give to your physician to complete pages 2 and 3.

CLAIMANT IDENTIFICATION B

1. Full Name (Last) (First) (Middle)
Plain Sharon Marie

Social Security Number Unit No.
243-11-2932 2755

2. Address City State Zip Code
102 Berkshire Dr. Jacksonville, N.C. 28546

Telephone Number
(910) 353-8768

3. Date of Birth: 01/28/61 / Mo. Day Yr

Height: 5'7 1/2" Weight: 158

Sex: Female

4. Marital Status: Single

Spouse's Date of Birth: Mo. Day Yr

Is Spouse Employed: Yes No

5. Number of Children: 0

Children's First Names and Date of Birth:

6. Job Sales: Coordinator Supervisor 700-7)

List Specific Duties of Your job
a. Supervised Hardware Dept. employees
b. Ordered merchandise; presented merchanise
c. Met hourly sales quota

7. Are you able to perform the important duties of your job on a regular basis?

☐ Yes ☒ No If no. which duties are you unable to perform? When do you expect to be able to perform the important duties of your job? Cannot see well enough to use register accurately; cannot stand for 8 hours; hands are numb and arms become numb-cannot lift more than 10 pounds.

8. I have been unable to work because of this disability since:
1/5/94/Mo. Day Year

I returned to work: Part Time Full Time - Mo. Day Yr.

I did not return to work

9. Date of your accident or the date your first noticed symptoms of your illness:

Mo. Day Yr.

Is your injury or illness related to your occupation at Sears?

No

If yes, explain:

10. Describe how and where the accident occurred or describe the first symptoms of your illness:

My illness is multiple sclerosis. My first symptoms in 1985 were numbness in my feet up my legs to my hips.

11. Date you were first treated for your illness or injury:

1985 - Mo. Day Yr

12. Have your ever had the same or when similar condition in the past?

Yes No

Symptoms have been persistent since 1985.
Diagnois in 1995

13. List all physicians who have treated you since the beginning of this disability.

| Name and Address | Date of Treatment From To |
|---|---|
| Ellis Muther III, M.D.<br>1315 S. Glenburni Rd, New Bern, NC 28560 | 11/85 |
| Hong Y. Chung, M.D.<br>P.O. Box 12134, Jacksonville, NC 28546 | 11/86 - present |

Clarence E. Ballenger, M.D. '93- Present
721 Professional Drive, New Bern, NC 28560

Mahmoud Issa, M.D. '93-Present
224 Memorial Drive, Jacksonville, NC 28540

14. Are you able to perform the duties of some other job on a regular basis:
□ Yes □ No If yes, list the other job(s) you believe you are qualified to perform. If no, when, if ever, do you believe you will be able to return to some other job?

No; not on reliable or dependable basis. My neurologist Dr. Ballenger has told me I may never be able to work again

.

OTHER EMPLOYMENT
15. Are you now, or have you at any time since becoming disabled, engaged in any other gainful employment/self employment?
□Yes ⊠No If yes, show name, address and phone:

Name (Company or Firm)

Address (No. and Street)

(City) (State) (Zip Code)

Business Phone Number
(Area Code)

16. During the past 12 months have you been working elsewher while employed at Sears?
☐Yes ☒No If yes, show name, address and phone:

_____
Name (Company or Firm)

_____
Address (No. and Street)

_____
(City) (State) (Zip Code)

_____

_____
Business Phone Number
(Area Code)

OTHER BENEFITS:
17. Have you applied for or are you receiving benefits from any of the following as a result of your disability?

CIRCLE YES OR NO Date benefits began or will begin
Yes No A. Primary Social Security (your Social Security Benefits) (have applied at initial - if approved benefits will start 8- 03-94)

Yes No B. Family Social Security
Yes No C. Federal, State, Municipal or other Government Agencies C._____
Yes No D. Workers Compensation
D._____

18. Are you receiving Social Security retirement benefits?

Yes No Date

/s/ SHARON M. PLAIN

**Attending Physician's Statement of Functional Capacity**
Mail this form to Sears in the self addressed envelope.

It is a crime to fill out this form with facts you know are false or to leave out facts you know are important.
The patient is responsible for having this form completed without expense to MetLife or the Employer.

1. History and Diagnosis

A. Date symptoms first appeared/or accident occurred: 1985
B. Date patient ceased work: Jan 5 1994
C. Date of first visit: 1-7 1985
D. Date of most recent examination: 3/4 1994
E. Frequency of visits: 19__
F. Past history:

G. Objective findings (including test results):
dystaxocgait marcus spurstates

H. Subjective symptoms:
Fatigue pulealuwiss vision problems

I. State primary diagnosis affecting work ability:
multiple sclerosis

J. State secondary diagnosis affecting work ability:
N/A

K. Present and future course of treatment:
depending on symptom

L. Other known injuries or presently active diseases that may affect work abilities:
N/A

M. Surgery:
N/A

Performed - Date_____
Anticipated - Date_____

Does patient's medical condition allow exposure to the following? Please check appropriate box and explain any limitation below. No Limitation - Some Limitation
Avoid Completely - Cannot Determine

Dust/Gases Fumes - N/A to all
Chemical/Solvents - N/A to all
Temperature Extremes - N/A to all
Noise Levels - N/A to all
Allergenic Agents - N/A to all
Stairs/Ladders - N/A to all
Scaffolds/Heights - N/A
Enclosed Spaces - N/A
Drafts/Damp Areas - N/A. to all

Explanation:

3. Because of the patient's medical conditions, are there any of following activities? Please check appropriate box and explain any limitation below. No Limitation - Some Limitation - Avoid Completely - Cannot Determine

Commuting (a) Ability to Drive - Some Limitation
(b) Use of public transporation
Walking - Some Limitation
Standing - Some Limitation
Sitting - No Limitation
Change of Position (sitting/standing) - Some Limitation
Assuming Cramped/Unusual Positions - Some Limitation
Reaching (forward/overhead) - Som Limitation

Pushing/Pulling/Twisting (arm/leg controls) - Some Limitation
Grasping/Handling - Avoid Completely
Finger Dexterity - Avoid Completely
Repetitive Movement (hands/feet) - Some Limitation
Climbing (stairs/ladders/scaffolds) - Avoid Completely
Balancing (exposure to falling) - Avoid Completely
Bending/Stooping/Squatting - Avoid Completely
Operating Truck/Dolly/Small Vehicle - Avoid Completely
Operating Heavy Equipment - Avoid Completely
Operatinng Electrical Equipment - Avoid Completely
Concentrated Visual Attention - Some Limitation
Other

Explanation



4. Evaluation of carrying and lifting abilities includes both intensity and frequency of the activity. For each wright classified below, please indicate the reasonable top limit of frequency. Please provide an explanation below with any additional comments regarding limitations on duration, ability to handle and distance (in front of body and above floor).

Intensity in Pounds Frequency: Percentage of Workday
Never - Less than 20% - 20%-60% - Greater than 60%

0-15 - Less than 20%
16-30 - Never
31-45 - Never

Explanation: Medium

5. Is there a past or present psychological problem that might interfere with patient's ability to work? If yes, please list your findings according to the DSM-III multiaxial classification.

Yes☐ No☒ Not Determined ☐

6. Indicate below if you have any additional information that is relevant to this patient's work ability. Please refer to the questions on the front of this form regarding Job Description and if necessary, discuss them with the patient.

Pt has multiple sclerosis --

7. Disability Evaluation - We are seeking your medical opinion on this topic. It will be our responsibility to assess it against vocational date, such as level or earnings (and job availability).

The following questions take into account whether the patient can perform the important duties of his/her job with reasonable continuity, including commuting to work. They also take into account whether the patient can perform the important duties of any other job with reasonable continuity including commuting to work. In answering these questions please consider his/her age, physical and mental capacities, education, training, and experience.

Is patient now totally disabled?

| For His/Her Occupation | For Any Occupation |
|---|---|
| Yes☒ No☐ Cannot | Yes☒ No☐ Cannot |

If No, when was patient able
to resume work activities?

Determine □ _____ Cannot Determine □

Determine □ _____ Cannot Determine □

If Yes, when do you think that persons can resume work activities:

Approximate Date:
Indefinite
Never
Cannot Determine

If Yes, is patient a suitable candidate for:
(a) vocational rehabilitation Yes □ No□
(b) therapeutic rehabilitation Yes □ No□

8. Progress Evaluation

| | |
|---|---|
| Recovered | Yes□ No ⊠ |
| Improved | Yes□ No ⊠ |
| Unimproved | Yes□ No ⊠ |
| Retrogressed | Yes□ No ⊠ |

9. In your opinion is the patient competent to endorses checks and direct the use of their proceeds?

Yes ⊠ No □

10. Remarks: If you have additional information relative to this disability claim, please use page four.

| C.E.Ballenger - | Board Certified Neurology |
|---|---|
| NameofPhysician | Board Certified Specialty |

| 227 Memorial Drive | Jacksonville,NC 28575 | | |
|---|---|---|---|
| Street Address | City or Town | State | Zip Code |

| (910) 253-3625 | 2/2/94 | /s/ C.E. Ballenger |
|---|---|---|

Plain v. Sears, Roebuck & Co.
C.A. No. 7:95-CV-185-F1

**DEFENDANT'S MOTION TO DISMISS**

**EXHIBIT D**

**EMPLOYER'S STATEMENT OF LTD CLAIM**

SEARS METLIFE

MetLife Insurance Co.
Group Disability Claims Office
P.O. Box 3043
Utica, NY 13504

EMPLOYER'S STATEMENT OF LTD CLAIM

FRONT SIDE TO BE COMPLETED BY THE HRC. REVERSE SIDE TO BE COMPLETED AND SIGNED BY THE UNIT MANAGER.

CLAIMANT'S FULL NAME(LAST)(FIRST)(MIDDLE)
PLAIN Sharon M.

DATE OF BIRTH
1-28-61

SOCIAL SECURITY NO.
243-11-2932

SERVICE DATE
9-8-83

EMPLOYMENT STATUS
REGULAR TIMECARD ☒
PART-TIME REGULAR ☐
TIMECARD ☐
CHECKLIST ☐

LTD INSURANCE EFFECTIVE DATE
9-24-84

UNIT NO. DIV/DEPT.
2755 9

HRC NO. LAST DAY WORKED
5577 01-05-94

☒ TIMECARD:

CURRENT HOURLY BENEFIT RATE 8.396

☐ CHECKLIST: CURRENT MONTHLY RATE

STATUS
☒ ACTIVE ☐LEAVE OF ABSENCE

☐TERMINATED/RETIRED ____ TYPE OF LEAVE

DATE DATE LEAVE BEGAN _____

**MEDICAL INFORMATION: INCLUDE COPIES OF ANY MEDICAL REPORTS, ETC. RELEVANT TO ASSOCIATE'S CLAIM**

IF CURRENTLY A MEMBER, PERIOD OF TIME, IF ANY, WITHOUT

From: _____To: _____

INSURANCE COVERAGE OR WITH SUSPENDED COVERAGE

IF NOT CURRENTLY A MEMBER DATE OF COVERAGE TERMINATION

**LONG-TERM DISABILITY (LTD)**

CURRENT LTD MONTHLY COVERED EARNINGS:
$ 1,666.67

OTHER DISABILITY BENEFITS -- ALWAYS COMPLETE THIS SECTION

FOR ASSOCIATED COVERED BY THE DISABILITY PLANS OF RHODE ISLAND, NEW YORK, NEW JERSEY, PUERTO RICO, HAWAII, AND/OR CALIFORNIA, GIVE AMOUNTS AND DATES OF DISABILITY BENEFITS UNDER SUCH PLANS RECEIVED BEYOND 20 WEEKS.

WEEKLY BENEFIT
$

ANTICIPATED EXPIRATION DATE*
/ /

*IF NO EXPIRATION DATE, SHOW "CONTINUING"

DID THE DISABILITY RESULT FROM A WORK-RELATED INJURY OR ILLNESS? YES NO XX
HAS A CLAIM FOR WORKERS COMPENSATION BEEN FILED? YES NO XX

IF YES, PROVIDE ADDRESS AND TELEPHONE NM-BER OF WORKERS COMPENSATION CLAIM OFFICE IN SPACE BELOW.

IF A CLAIM HAS BEEN FILED

LEGAL RATE PER WEEK
$

DATE STATUTORY BENEFIT STARTED
DATE STATUTORY BENEFITS TERMINATE

IF NO TERMINATION DATE, SHOW "CONTINUING"

ATTACH A COPY OF ALL NOTICES, AGREEMENTS, AWARDS AND/OR COMPROMISE SETTLEMENTS

WORKED IN STATE

**IMPORTANT: UNIT MANAGER MUST COMPLETE ASSOCIATE'S JOB DESCRIPTION ON REVERSE SIDE**

HRS STAMP

Sears, Roebuck and Co.
Atlanta HRC #5577
4740 Hugh Howell Road
Tucker, GA 30084-5006

/s/Y. Cohenoru/ac
SIGNATURE OF HRC MANAGER

3-16-94 (404) 496-7723
TELEPHONE NO.

It is a crime to fill out this form with facts you know a leave out facts you know are important.

JOB TITLE
Sales CoOrdinator - Non Commission

PRESENT ASSIGNMENT DATE
5-31-92

IF PART-TIME REGULAR NUMBER OF DAYS WORKED PER WEEK PRIOR TO DISABILITY NUMBER OF HOURS WORKED PER DAY PRIOR TO DISABILITY

CURRENT OCCUPATIONAL REQUIREMENT

Please check appropriate box to indicate current occupation requirements. When more than one exposure or activity is listed per line, cross out that which does not apply.

Exposure to: 0% - 0% 1-19% Working Day - 20%-60% Working Day - 61%-100% Working Day

Dust/gas/fumes - 0%
Chemicals/solvents - 0%
Temperature extremes - 0%
High noise levels - 0%
Allergenic agents - 0%
Enclosed spaces - 0%
Wet conditions - 0%
Reducing lighting levels - 0%
Electrical sources - 0%

Explanation:

Required Activities - 0% - 1-19% Working Day - 20%-60% Working Day - 61%-100% Working Day

Sitting - 1-19%
Standing - 61%-100%
Walking - 61%-100%
Climb stairs/ladder/scaffold - 1-19%
Balancing (Exposure to falling) - 1-19%
Cramped/unusual positions - 0%
Extending reach forward/overhead - 0%
Push/pull/twist - 1-19%

Grasp/handle - 0%
Bend/stoop/squat - 1-19%
Fine hand dexterity - 0%
High repetitive motion - 0%
Forceful wrist twisting - 0%
Operate truck/dolly/small vehicle - 0%
Operate heavy equipment - 0%
Fine visual auditory attention - 0%
Precise verbal/written communication - 0%
Other - 0%

Explanation:

Carrying & Lifting Requirements - Frequency - Never - Less than 20% - 20%-60-% - Greater than 60%

Intensity in Pounds

0-15 - Less than 20%
16-30 - Less than 20%
31-45 - Never
over 45 - Never

Explanation (if necessary ):

Supervisory Functions (if applicable): Raining, co-ordinating and directing efforts of sales associates in sales mehtods and customer support standards. Supports sales manager, performs miscellaneous duties as assigned.

Other Significant Factors of Comments:

/s/Douglas A. Turner
SIGNATURE OF UNIT MANAGER

(910) 353-2223 — TELEPHONE
3-15-94 — DATE

Plain v. Sears, Roebuck & Co.
C.A. No. 7:95-CV-185-F1

**DEFENDANT'S MOTION TO DISMISS**
**EXHIBIT E**
**LETTER OF BENEFITS APPROVAL**

Cosby Manor Road
P.O. Box 3043
Utica, NY 13504

March 30, 1994

MetLife

Sharon Plain
102 Berkshire Dr
Jacksonville, NC 28546

Dear Ms. Plain

RE: Long Term Disability
Claim No.: 9406840
No.: 31003
S.S. No.: 243-11-2932

Your claim for Long Term Disability benefits under the Sears Group Long Term Disability Insurance Plan has been approved. Provided you continue to qualify for benefits, payments will be issued the last week of the month payable on the last day of the month.

"Total Disability means that because of an Illness or Injury:

(1) you cannot do your job; and
(2) you cannot do any other job for which

you are fit based on your education, training, or experience during the Waiting Period and during the next 24 consecutive months, whether or not monthly benefits are paid for each of these months. Thereafter, you will no longer be Totally Disabled under the provisions of the plan unless Metropolitan considers you to meet the above definition and you are approved to receive and/or are receiving Social Security Administration Disability benefits. If you have not been approved to receive Social Security Administration Disability benefits by the end of the initial 24 month Long Term Disability benefit period and you are later approved to receive Social Security Administration Disability benefits for the same disability and this approval is:

-retroactive to the time Long Term Disability benefits were payable, and

-received within 12 months of the cessation of the Long Term Disability benefits,

then Long Term Disability benefits will be reinstated back to the time Long Term Disability benefits ceased. A lump sum payment will be made at that time. Thereafter, payment will be made in monthly installments in accordance with the provision of the plan."

If you are not eligible to receive Social Security Disability benefits due to insufficient quarters or you attain age 65 prior to the expiration of the initial 24 months Long Term Disability benefit period, you must meet the definition of disability as defined by the Social Security Administration to continue to receive Long Terms Disability benefits. The Social Security definition of disability is as follows:

"Disability means that you are so severely impaired, mentally or physically, that you cannot perform any substantial gainful

work. The impairment must be expected to last at least 12 months or to result in earlier death."

The amount of your Basic Long Term Disability monthly benefit is equal to the lesser of 50% of the first $12,500.00 of monthly Long Term Disability Covered Earnings or 60% of your monthly Long Term Disability Covered Earnings, reduced by Other Income Benefits as defined in your Certificate of Insurance.

Your Long Term Disability effective date is May 26, 1994. Therefore, payment for the month of May 1994 must be prorated at 06/30 days for a payment of $166.67. You should receive this check towards the end of May 1994.

Please refer to the enclosed Approval Notice which indicates your benefit schedule to prevent any incorrect disability payments, you should notify us promptly if:

-You return to work (regardless of the kind of work to which you return); or

-Your doctor advises you that your condition has improved and that you are able to return to your own occupation or some other type of work.

-You receive "Other Income Benefits": Such as Social Security, Worker's Compensation, State Disability Insurance, and any other disability income benefits.

If you should have any question or concern, please feel free to contact our office.

Yours truly

/s/ Sal Marchese

Sal Marchese
Disability Management Specialist
Disability Management Services
(315) 792-2396
SM/hf
cc: Ms. Kathy Hopkins

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| SHARON MARIE PLAIN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. |
| | ) | 7:95-CV-185-FF1 |
| SEARS, ROEBUCK AND CO. | ) | |
| Sears Tower | ) | |
| Chicago, Illinois 60684 | ) | |
| and SEARS, Store 2755 | ) | |
| Jacksonville, NC 28540 | ) | |
| | ) | |
| Defendants. | ) | |

ENTERED: February 2, 1996

**DEFENDANT'S MEMORANDUM**
**IN SUPPORT OF ITS MOTION TO DISMISS**

Defendant Sears, Roebuck and Co., by and through its counsel, files this Memorandum in Support of its Motion to Dismiss.

## I. INTRODUCTION

Plaintiff filed this action on December 22, 1995, alleging that Defendant Sears, Roebuck and Co.[1]

[1]Plaintiff has also identified as a party Defendant's retail store in Jacksonville, North Carolina. The store is not a separate corporate entity and is not Plaintiff's former employer. Thus, the Jacksonville store is not a proper party.

discriminated against her in violation of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §1201, et seq. ("ADA") and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. ("Title VII"). Specifically, Plaintiff alleges that Defendant violated the ADA by harassing her and discharging her through its failure to accommodate her disabilities. Plaintiff further alleges that Defendant violated Title VII, based on Plaintiff's sex, by forcing her out of the Company's promotion pattern, denying her promotions that were awarded to men, and terminating her.

Defendant had filed its Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because Plaintiff's Complaint fails to state any claim upon which relief can be granted under either the ADA or Title VII. There are three separate grounds for dismissing Plaintiff's Complaint. Specifically, Plaintiff has failed to satisfy administrative prerequisites to filing a private suit under each of these Acts because 1) she did not file a Charge of Discrimination with respect to her termination allegation and 2) because she failed to raise any of her other claims in a timely manner before the EEOC. Finally, Plaintiff's "termination" allegation arising under the ADA should also be dismissed because Plaintiff cannot establish that she is a "qualified individual with a disability."

## I. FACTS

Plaintiff's Complaint seeks to challenge specific instances of alleged discriminatory conduct. Plaintiff alleges in her Complaint that on March 2, 1992, she "was subjected to harassment." (Compl. para. 11.) Plaintiff further alleges that on August 10, 1993, "Doug Turner, Store Manager, announced at a meeting to the other employees that Plaintiff would not be placed on a staff schedule due to health and her doctor's recommendation." (Compl. para. 12.) Plaintiff states in her Complaint that she filed EEOC Charge No:

141950278 in February 1994. (Compl. para. 6; see Attach. A to Def.'s Mot., EEOC Charge & Notice.)[2] However, Plaintiff filed this charge with the EEOC on February 13, 1995. It was "date stamped" received by the Commission on February 1995, not 1994.

Plaintiff's Complaint also specifically alleges that on April 28, 1995, she was "terminated...by failure of Defendant, Sears, to reasonably accommodate Plaintiff." (Compl. para 17.) No EEOC charge challenges Plaintiff's termination of employment with Sears.

## II. ARGUMENT AND AUTHORITIES

A. PLAINTIFF DID NOT FILE A CHARGE CHALLENGING HER TERMINATION.

Aggrieved persons cannot bring a Title VII or ADA lawsuit unless they first exhaust their administrative remedies by filing an administrative charge of discrimination with the EEOC. See e.g., Payne v. Duracell U.S.A., 745 F. Supp. 341 (M.D.N.C. 1990); Maxey v. M.H.M. Inc., 828 F. Supp. 376 (D. Md. 1993). In this case, however, Plaintiff failed to challenge her termination at the administrative level. Accordingly, Plaintiff cannot challenge her alleged termination in court.

B. PLAINTIFF FAILED TO FILE A TIMELY CHARGE OF DISCRIMINATION CHALLENGING THE ALLEGED DENIAL OF ACCOMMODATION, HARASSMENT, AND PROMOTION DENIAL.

Under the antidiscrimination laws, Plaintiff must file her Charge of Discrimination "within one hundred and eighty days after the alleged unlawful employment practice occurred." Sec. 706(e)(1) of Title VII of Civil Rights Act of

---

[2]Defendant recognizes that, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, this matter may be treated as a Motion for Summary Judgment where the Court relies on matters outside the pleadings.

1964. The Fourth Circuit Court of Appeals strictly enforced the limitation periods found in the antidiscrimination laws. For example, the Court in Hamilton v. 1st Source Bank, 928 F.2d 86, 90 (4th Cir. 1990), remanded a discrimination case with "directions to dismiss it as untimely filed." In reaching its decision, the Court stated that

> In setting a 180-day period in which employees could file complaints with the EEOC, Congress considered and balanced the competing policies of investigating and settling claims promptly, and protecting the aged from discrimination. We cannot second-guess its judgment.

Id.

In this case, Plaintiff's single EEOC Charge was filed on February 13, 1995. Under the law, this could only represent a timely charge of discrimination for events occurring between August 17, 1994 and February 13, 1995. However, in her federal court Complaint, Plaintiff specifies the actual dates in 1992 and 1993 when the alleged discriminatory conduct occurred. Thus, Plaintiff's administrative charge is untimely as shown by the allegations in Plaintiff's Complaint.[3] Accordingly, Plaintiff's action is barred. See Id.

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[3] Defendant acknowledges that Plaintiff's Complaint also makes nonspecific allegations of discriminatory conduct. For example, Plaintiff claims that she was denied promotions awarded to similarly situated male employees. (Compl. para. 16) However, these claims must also be dismissed because they were not raised in a timely administrative charge. Indeed, no alleged conduct by Defendant could have occurred within 180 days of the date that Plaintiff filed her single EEOC Charge of Discrimination. Plaintiff worked for Defendant on January 5, 1994 but she did not file her administrative Charge until more than a year later, on February 13, 1995. (See Attach. B to Def.'s Mot., Aff. of Lois Worrell, Human Resources official.) Since she was not working after January 5, 1994, no alleged unlawful promotion denials could have occurred within the 6 month period preceding her charge.

C. PLAINTIFF CANNOT ESTABLISH THAT SHE IS A QUALIFIED INDIVIDUAL WITH A DISABILITY.

Plaintiff alleges that she is a "qualified individual with disabilities."[4] However, Plaintiff receives disability benefits from the Social Security administration and from the disability Plan sponsored by Defendant because she is unable to work in any capacity. By accepting benefits, Plaintiff acknowledges that she "cannot do [her] job" and that "[she] cannot do any other job for which [she was] fit based on [her] education, training or experience." (Ex. E of Attach. C to Def.'s Mot., Letter of Benefits Approval.) Accordingly, Plaintiff is not protected by the ADA as a qualified individual with a disability. See Reigel, 859 F. Supp. at 969.

The fact that Plaintiff is not a qualified individual with a disability is demonstrated by statements in Plaintiff's applications for disability benefits. Under the ADA, a "plaintiff's statements made for the purposes of obtaining disability benefits [are] binding admissions by plaintiff to the effect that [the plaintiff] could not perform the essential functions and duties of [her] job." Reigel at 969 (citing August v. Offices Unlimited Inc., 981 F.2d 576 (1st Cir. 1992)). A plaintiff's certification "to her insurance carrier that she was unable to work because of her ailments and would be unable to work in the foreseeable future..." is a binding admission that precluded her from claiming disability discrimination under the ADA. Reigel at 969 (citing Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768, 770-71 (8th Cir. 1987), cert. denied, 485 U.S. 938 (1988)).

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[4] In order to state a prima facie case of discrimination under the Americans With Disabilities Act, Plaintiff must establish that she is "in the protected class." See Ennis v. National Ass'n of Business & Educ. Radio, 53 F.3d 55, 58 (4th Cir. 1995)(plaintiff ailed to establish that she was "qualified to perform the essential functions of her job...") Plaintiff is not "in the protected class" unless she can establish that she is a "qualified individual with a disability." ADA §§101(8) & 102(a).

Plaintiff in this case cannot take contradictory positions. See Reigel at 970 ("[plaintiff] cannot speak out of both sides of her mouth with equal vigor and credibility.") in her applications for disability benefits, Ms. Plain recited

(a) that she "[c]annot see well enough to use register accurately; cannot stand for 8 hours" (Ex. C of Attach. C to Def.'s Mot., Claimant's Statement of LTD Claim.)

(b) that her "hands are numb and arms become numb - cannot lift more than 10 pounds" (Ex. C of Attach. C to Def.'s Mot.)

(c) that she cannot perform the duties of some other job "...on a regular or reliable basis" (Ex. C of Attach. C. to Def.'s Mot.)

(d) that her "neurologist Dr. Ballenger had told [her that she] may never be able to work again" (Ex. C of Attach. C to Def.'s Mot.)

(e) that she is kept from working because of "Hurt/ache across back from neck down to lower back with intermittent sharp pains going up back like a knife; hips and legs hurt because gait is out of whack (the the hurt down the hips and legs is a tingling numbness); feet and hands are numb; even wearing clothes hurts at times; eyes blur and at times cannot distinguish letters, numbers and have difficulty with reading comprehension at times." (Ex. A of Attach. C to Def.'s Mot., SocialSecurity Disability Report.)

(f)and that her "Neurologist told [her that she] was 100% disa bled and should stop working" (Ex. A of Attach. C to Def.'s Mot.)

Thus even if Plaintiff had timely filed her EEOC charge, her ADA discharge claim cannot survive. The fact that Plaintiff is receiving long- erm disability benefits, along with the statements and representation made in Plaintiff's applications for these disability benefits, requires that Plaintiff's disability-based discharge claim be dismissed.

## III. CONCLUSION

Based on the arguments and authorities above, Defendant respectfully requests that its Motion to Dismiss be granted.

Dated this the 1st day of February, 1996.

Respectfully submitted,
/s/ James B. Spears, Jr.
James B. Spears, Jr.

/s/Aaron M. Christensen
Aaron M. Christensen

HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.
Federal Plaza Building
400 West Trade Street
Charlotte, NC 28202

(704) 342-2588
Counsel for Sears, Roebuck
& Company

CERTIFICATE OF SERVICE

I, Gloria Knotts, do hereby certify that I have this day served a copy of the within and foregoing **1) Defendant's Motion to Dismiss and 2) Defendant's Memorandum In Support of Its Motion to Dismiss** by placing copies of same in the United States Mail, properly addressed and with the correct amount of postage affixed thereto, to the following person:

Sharon M. Plain, Pro Se
102 Berkshire Drive
Jacksonville, NC 28546-8403

Dated this the 1st day of February, 1996.

Respectfully submitted,

HAYNESWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.

By: /s/ Gloria Knotts
Gloria Knotts
Legal Secretary
Federal Building
300 West Trade Street
Charlotte, North Carolina 28202
(704) 342-2588

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| SHARON MARIE PLAIN, | ) |
| Plaintiff, | ) |
| v. | ) C.A. NO. 7:95-V-185-F1 |
| SEARS, ROEBUCK AND CO.<br>Sears Tower<br>Chicago, Illinois 60684<br>and SEARS, Store 2755<br>Jacksonville, NC 28540 | ) |
| Defendants. | ) |

ENTERED: March 6, 1996

PLAINTIFF'S OPPOSITION NOT TO DISMISS

Plaintiff Sharon Marie Plain, moves pursuant to Section 107 (a) of the Americans With Disabilities Act of 1990 ("ADA") 42 U.S.C. § 1277 (a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII 2000e-5(f)(1) and (3), and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981 (A). This action is authorized and instituted pursuant to Title VII of the Civil Rights Act, as amended 42 U.S.C. 2000e et seq §§ 706(f)(1) and 706(f)(3).

Plaintiff submits In Opposition to Defendants' Motion to Dismiss under FRCP 12(b)(6).

(1) CHARGE FILED CHALLENGING TERMINATION

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Plaintiff did in fact file in accordance to EEOC. Complaint was certified mailed hand stamped Dec. 31, 1994 to EEOC in Charlotte, NC. Receipt for certified mail Z 789 041 267. Received at EEOC hand stamped Jan. 3, 1995.

Plaintiff was in fact told by EEOC Deputy Director Joseph P. Doherty to be assured that the we (EEOC) will do whatever is required to assure your (Plaintiff's) rights are protected.

Plaintiff was questioned by manager of charge intake. Deputy Director told Plaintiff that the EEOC in Charlotte, NC had to get permission to investigate Plaintiff's charge. Plaintiff was told Washington, DC had given permission to EEOC in Charlotte NC, to the Deputy Director to investigate Plaintiff's charges.

Plaintiff's charge was filed in a timely manner and the EEOC issued a NOTICE OF RIGHT TO SUE, it was hand stamped Sept. 25, 1995. Charge No. 141950278. Plaintiff received the NOTICE OF RIGHT TO SUE on or about September 28, 1995.

Plaintiff had every right to pursue her complaint when the NOTICE OF RIGHT TO SUE, was received on or about September 28, 1995 and hand stamped Sept. 25, 1995 was issued.

The EEOC took the charge, had permission to investigate, therefore the case was filed in a timely fashion due to the date of the NOTICE OF RIGHT TO SUE. The incorrect address was on the EEOC Dismissal and Notice of Rights which delayed Plaintiff from receiving the notice. It does state "If you decide to sue, you must sue, WITHIN 90 DAYS from your receipt of this Notice; otherwise your right

to sue is lost. Plaintiff did invoke all rights to pursue Plaintiff (you) have the right to sue respondent(s) named in Plaintiff's (your) charge in U.S. District Court. Plaintiff has done so, therefore the EEOC did investigate issues raised and did nothing.

Plaintiff was a victim of abuse by her employer and the EEOC. Plaintiff charged harassment, discrimination of sex and disability. This has caused undue stress, much aggravation to Plaintiff's health. Plaintiff invoked every Right to Sue, under the laws. Much negligence to Plaintiff has been done.

See the attached Dismissal, see the certified copy of the attempt of Plaintiff for help by the EEOC, and letter from EEOC Joseph P. Doherty to Plaintiff. PLAINTIFF'S OPPOSITION NOT TO DISMISS, EXHIBIT A.

(2) ACCOMMODATION. HARASSMENT AND PROMOTION DENIAL

Plaintiff had 90 days to file suit under Title VII and/or the Americans with Disabilities Act. Plaintiff's Complaint was filed within the 90 days having filed December 22, 1995. In United States District Court, Eastern District of North Carolina. Therefore, for ADA requirements, Plaintiff's action was filed in a timely fashion administratively.

Plaintiff respectfully pleads, "ADA" is Enforced to the fullest extent of the law. PLAINTIFF'S MOTION TO OPPOSITION EXHIBIT B.

(3) ESTABLISH QUALIFICATIONS UNDER ADA

Plaintiff was a "Qualified Individual with a Disability" from the first diagnoses of transverse myelitis,

pernicious anemia well before Plaintiff was offered and accepted a full time job position as Sales Supervisor in 1989.

Plaintiff did make Defendant aware of the diagnoses of transverse myelitis, in 1985. Defendant was Plaintiff's manager during a period of time, knew of diagnoses of transverse myelitis in 1985. Plaintiff never hid the fact of disability.

Plaintiff did make aware of the diagnoses of transverse myelitis in 1985 and pernicious anemia in 1988 and on B-12 shots. Plaintiff did tell Immediate Sales Manager who offered Plaintiff full time position as Sales Supervisor the diagnoses of transverse myelitis and 1985 and pernicious anemia in 1988, once offered the full time job as a Sales Supervisor in 1989.

Plaintiff was a "Qualified Individual with a Disability/Disabilities" because the Plaintiff could have performed her job with accommodations. That Plaintiff did ask for specific accommodations, on more than one occasion. Plaintiff never hid her Disability/Disabilities from anyone.

Plaintiff was working full time as a Sales Supervisor form 1989 up to date of the diagnoses of multiple sclerosis in November 1991 and did tell the Store Manager, Sales Manager who were there at the time. Plaintiff did tell the Store Manager and Sales Manager during the respective times of the diagnoses multiple sclerosis. Plaintiff never hid the Disabilities from her immediate Sales Manager and Store Manger or anyone else. Plaintiff did go public in the newspaper with the fact she had multiple sclerosis to inform the public about multiple sclerosis in September 1993 and through out 1994, 1995, 1996.

Plaintiff has never hid her disability from anyone. Plaintiff has been interviewed on many radio shows and has been interviewed by local television station on multiple sclerosis.

Plaintiff was a "Qualified Individual with a Disability/Disabilities", while holding full time job as a Sales

Supervisor, since 1989. Defendant was fully aware (including Store Manager) of the disabilities. Same Store Manager continues to be employed with Defendant. Plaintiff worked very hard and defendant was aware of Plaintiff's medical problems.

Plaintiff worked during this time as a "Qualified Individual with a Disability/Disabilities" while holding a job as Sales Supervisor beforehand. Plaintiff did meet skills, experience and education and was highly qualified for her job.

The ADA was signed into law by President Bush on July 20, 1990; known as Public law 101-336. If private sector employs 15 or more people, an individual is covered by Title 1 of The Americans with Disabilities Act (ADA), to be enforced by the EEOC.

Plaintiff was not protected by the "ADA" The Americans with Disabilities Act that was signed and enacted into law on July 26, 1990 and Title 1 of the Civil Rights Act of 1991 ,public Law 102-166. Defendant did not provide "Reasonable Accommodations" to Plaintiff with Disabilities. All employers with 25 or more employees must comply, effective July 26, 1992. Plaintiff was a victim of extreme abuse of employment not complying with the very law designed to protect her.

Plaintiff did not know how long she would be out of work due to the undue stress, intolerable behavior of defendant and co-workers. This was allowed to go on. The Store Manager nor the Sales Manager did anything when Plaintiff brought concerns to their attention.

The Defendant and co-workers caused exacerbations of disability due to the mis-treatment of plaintiff, a person with a known Disability, was harassed, received mental anguish, was humiliated, received condescending remarks was abused negligently.

Plaintiff was victim of intentional, willful, malicious, deliberate conduct; with desire and intent of inflicting serious damage and distress to Plaintiff.

Plaintiff was not treated equally in treatment in promotions. Plaintiff constantly harassed because of work hours. Plaintiff not allowed to user rest room when needed, due to lack of help on the Sales Floor.

Plaintiff is now labeled 100% Physically Challenged and does receive Social Security Disability Income (SSDI). Plaintiff was forced to file (SSDI) due to mis-treatment by defendant. Defendant (Store Manager) did admit to Plaintiff that he never saw doctors notes. Therefore, defendant should have seen the three doctors notes if he was the Store Manager. Plaintiff did turn in three notes to Store Personnel. That should have been in a separate file. Plaintiff was always constantly watched by other Store Personnel and treated much differently than others.

Plaintiff was at a meeting (on or about August 10, 1993.) Defendant stated at the Staff meeting Plaintiff would not be on the Staff Schedule due to Plaintiff's health and her doctor's note; embarrassed Plaintiff. it was wrong for the Store Manager to announce her disability and job accommodation requirements in front of co-workers at a meeting, a breach of confidentiality.

Defendant caused additional harm, job stress and aggravation which brought on additional related stress to Plaintiff, causing exacerbations of Plaintiff's disability, multiple sclerosis by the treatment of immediate Store Manager, immediate Sales Manager, other Store Staff in which Plaintiff held a position on the Store Staff.

Plaintiff tried to talk to Store Manager about his comment, a few days later about what Defendant stated in front of others at Staff Meeting. Plaintiff was told by the Store Manager, she was not flexible and did not see any jobs that Plaintiff could be promoted to due to Plaintiff's inflexibility on more than one occasion. Defendant's had not concern of Plaintiff s disability, nor did the defendant correct the abuse of himself, Sales Manager, Store Staff and co-workers. The Defendant never corrected any problem.

Plaintiff has suffered personal and economic embarrassment, thus causing Plaintiff to file for SSDI. Plaintiff was denied a requested day off, in which Plaintiff had acquired vacation time that was lost; Plaintiff asked for Christmas eve off December 1993, for health reasons, but was denied by Store Manager.

Defendant kept telling Plaintiff to get a doctor's release over and over; when Plaintiff told the Store Manager her doctor would not release her to work different hours. Defendant became more demanding and told Plaintiff he did not know what he could do for her. Therefore, adding job stress, harassment, and constant nagging deteriorated disability. Plaintiff's doctor advised her to stop working, after Plaintiff explained what was conditions she was constantly subjected to every day.

Plaintiff was told if no doctor';s release obtained the Defendant did not know what he could do for Plaintiff. (Who worked very hard despite her disabilities and was subjected to much abuse.)

Plaintiff was forced to file for disability. The discriminatory and retaliatory acts of the Defendants were done willfully, malicious, wantonly and with reckless disregard for Rights of Plaintiff. The acts of the defendant have had the effect of depriving Plaintiff of equal opportunities because of physical handicapped in violation of The Americans with Disabilities Act, Causing Plaintiff to file for SSDI.

Plaintiff did not seek legal council while on sick leave and on a leave of absence to find no one cared to help a person physically challenged and Plaintiff was told by several attorneys that they would not take a case on Sears, thus causing Plaintiff to investigate more finding the EEOC was no better, but to issue a NOTICE OF RIGHT TO SUE. Plaintiff is a victim and did file in a timely fashion per EEOC NOTICE OF RIGHT TO SUE, Plaintiff was directly told by EEOC Deputy Director he had to receive permission to investigate Charge No. 141950278 in which he was

granted permission. From Washington, DC. could not have investigate Plaintiff's charges Therefore, Plaintiff was a victim to all sources involved.

This motion in Plaintiff's case has been handled very wrong in Plaintiff's case. Plaintiff has consciously been violated with the misuse of her MEDICAL RECORDS, SSDI AWARD LETTER, LTD Claim and EMPLOYER'S STATEMENT OF LTD CLAIM. Plaintiff was forced to file for SSDI for survival.

PLAINTIFF'S OPPOSITION NOT TO DISMISS EXHIBIT B.

Plaintiff has evidence of the truth not on LTD CLAIM that Lois Worrell, was a notary when plaintiff worked #3 is Ms. (Miss) Plain was employed by the company as a Sales Supervisor a fact this Plaintiff found out while on a leave of absence from job. Plaintiff's job grade was dropped without Plaintiff's consent, from a JG-11 Sales Supervisor to a JG-7, a Selling Coordinator, newly created.

Plaintiff did not accept the first offer of $3.50 an hour plus commission in lawn-n-garden, then a few days later the Store Manager offered Plaintiff $4.50 an hour plus commission. Plaintiff refused and told Store Manager that Plaintiff would stay at the pay rate Plaintiff was at and Plaintiff was fully aware that she fell under the grandfathers and refused to have pay dropped; did not sign anything nor discussed it with Lois Worrell.

Plaintiff learns Lois Worrell discussed Plaintiff's Job an discussing Plaintiff's personal business with a co-worker who worked for Plaintiff. Thus, being a breach of contract.

On June 16, 1994 Luther Winkle left a message on Plaintiff's answering machine, at 3:35 P.M. About the job grade. Luther Winkle tells Plaintiff on Plaintiff's answering machine "Carte blank, he did not have the correct answers!" Plaintiff has been humiliated, harassed and Plaintiff has been a victim of humiliation after finding out she had been demoted and was told of it; this is poor business.

Plaintiff was a victim of abuse by not knowing defendant demoted her 4 Levels of demotions showing up. This caused much hurt, undue stress and mistreatment be defendant engaging in practices without consent of Plaintiff. Once learning of the truth and not be informed of the truth, Plaintiff was a victim of job grade.

Plaintiff also has original copy of Met Life on job duties. Which is inaccurate what Plaintiff was required to do. Copy with no signature was sent to Plaintiff's disability attorney, when Lois Worrell was directly asked by Plaintiff why the Store Manager's name was not signed on the paper, Lois Worrell did not answer. Store Manager did admit he signed the original paper. Plaintiff did have the copy not signed.

Plaintiff did find out the Job Title had been changed, therefore Plaintiff started in investigate. Plaintiff called met disability for LTD and asked for a copy of tne complete file, after awhile this was done, by a Sal M. Plaintiff saw where Store Manager's name was not signed on the Plaintiff's disability attorney received and gave copies to Plaintiff. When Lois Worrell was questioned about it, she stated to Plaintiff the Store Manager did sign the form of Job Title. B. See the attached, Job Title, one given to plaintiff from her disability attorney not signed by Store Manger. Plaintiff requested her filed to be sent to her and received them. Job Title was then signed by Doug Turner the Store Manager. PLAINTIFF'S OPPOSITION NOT TO DISMISS, EXHIBIT B.

C. See the attached, Dated October 3, 1994, four pages. Plaintiff asked many questions and wanted answers that came from Anthony Rucci in Chicago. PLAINTIFF'S MOTION NOT TO DISMISS, EXHIBIT C.

## CONCLUSION

Based on the arguments and paperwork above, Plaintiff respectfully requests that its Motion in Opposition be granted in respect to a physically challenged person was indeed a victim by many. Prayer for relief that Motion of Plaintiff's Opposition not to Dismiss, be granted.

Dated this the 5 day of MARCH, 1996.

Respectfully submitted,
/s/Sharon Marie Plain,
Pro Se

Sharon Marie Plain, Pro Se
102 Berkshire Drive
Jacksonville, North Carolina
28546-8403
(910) 353-8768

3/5/96 - Angela Lord Brock
My Commission Exp: 6/22/96

SEARS, ROEBUCK & CO.
C.A. No. 7;95-CV-185-F1

PLAINTIFF'S MOTION OF OPPOSITION NOT TO DISMISS

**EXHIBIT A**

PLAINTIFF ENCLOSED DISMISSAL. SEE ATTEMPT FOR HELP FROM EEOC, CERTIFIED RECEIPT COPY DATED TO EEOC DECEMBER 31, 1994.

Equal Employment Opportunity Commission

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## DISMISSAL AND NOTICE OF RIGHTS

TO:FROM:Charlotte District Office
Ms. Sharon Plain
Equal Employment Opportunity Commission
103 Berkshire Drive
5500 Central Avenue
Jacksonville, NC 28546
Charlotte, NC 28212-2799

[ ] *On behalf of a person aggrieved whose* ide: tity is CONFIDENTIAL (29 CFR § 1607.7(a))

---

Charge No:141950278EEOC RepresentativeBrenda L.Lightsey

Telephone No.(704) 567-7133

*(See the additional information attached to this form)*

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON:

[ ] The facts you allege fail to state a claim under any of the statutes enforced by the Commission.

[ ] Respondent employs less than the required number of employees.

[ ] Your charge was not timely filed with the commission, i.e., you waited too long after the d ate (s) of the discrimination you alleged to file your charge. Because it was filed outside the time limit prescribed by law, the Commission cannot investigate your allegations.

[ ] You failed to provide required information, failed or refused to appear or to be available for necessary interviews/conferences, or otherwise refused to cooperate in the extent that the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.

[ ] The Commission has made reasonable efforts to locate you and has been unable to do so. You have ad a least 30 days in which to respond to a notice sent to your last known address.

[ ] The respondent has made a reasonable settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

[x ] The commission issues the following determination. Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

[ ] Other

- NOTICE OF SUIT RIGHTS -

[ x] Title VII and/or the Americans with Disabilities Act: This is your NOTICE OF RIGHT TO SUE, which terminates the Commission';s processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost.

[ ] Age Discrimination in Employment Act: this is your NOTICE OF DISMISSAL OR TERMINATION, which terminates processing of your charge. If you want to pursue your charge further, you have the right to sue this respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must sue WITHIN 90 DAYS form your receipt of this Notice; otherwise. your right to sue is lost.

[ ] Equal Pay Act (EPA): EPA suits must be brought within 3 years (3 years for willful violation) of the alleged EPA underpayment.

I certify that this notice was mailed on the date set out below.

On behalf of the Commissioner:

/s/ Joseph P. Doherty

Sep 25, 1995
Date
Marsha J. Drane,
District Director
Enclosures
Information Sheet
Copy of Charge EEOC Form 141 (Test 5/95)

cc: Sears

**CHARGE OF DISCRIMINATION**

This Form Is Affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY ☐ FEPA
☒ EEOC
CHARGE NUMBER 141950278

_____ and EEOC
State or local Agency, if any.

NAME *(Indicate Mr., Ms., Mrs.)*
Ms. Sharon M. Plain

HOME TELEPHONE *(Indicate Area Code)*
(910) 353-8768

STREET ADDRESS CITY, STATE AND ZIP CODE
102 Berkshire Drive Jacksonville, NC 28546

DATE OF BIRTH
01/28/61

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME
Sears #2755

NUMBER OF EMPLOYEES, MEMBERS
Cat C (201-500)

TELEPHONE *(Include area code)*
(910) 353-2223

STREET ADDRESS — CITY, STATE AND ZIP CODE
Country Club Rd., — Jacksonville, NC 28546

COUNTY
199
NAME TELEPHONE NUMBER *(Include Area Code.)*

STREET ADDRESS — CITY, STATE AND ZIP CODE

COUNTY

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es)*

_ RACE _ COLOR _SEX _ RELIGION
_NATIONAL ORIGIN _RETALIATION _ AGE
_ DISABILITY _ OTHER *(Specify)*

DATE DISCRIMINATION TOOK PLACE

*EARLIEST* — *LATEST*
03/02/92 — 07/02/94

CONTINUING ACTION
THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I was hired by the above company in 1983 as a sales clerk. I progressed to the position of Sales Supervisor which was later reclassified to Sales Coordinator. During my employment I was denied a reasonable accommodation, harassed, and denied a promotion because of my disabilities and sex.

Management officials told me that I was not going to be placed on the "Staff Schedule" because of my inflexible schedule and health. I was told by the store manager that if I could not work a regular schedule release from my doctor to work a regular schedule that he did not know what he could do for me; He demanded I get a release from my doctor to work a regular schedule. It was also indicated that I would not advance due to my health. I was not given a reason for the harassment and promotion denial.

I believe I am the victim of discrimination based on my disabilities in violation of Title I of the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures

NOTARY (When necessary for state and Local Requirements)

---

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Date Charging Party *(Signature)*

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, Month, and Year)

STATE OF NORTH CAROLINA
CASE NAME Plain vs. Sears #2755
CITY/COUNTY OF JACKSONVILLE/ONSLOWCASE NUMBER

AFFIDAVIT

I, Sharon M. Plain being first duly sworn upon my oath affirm and hereby say:
*(Name)*

I have been given assurances by an Agency of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 34 years of age, my gender is Female and my racial identity is White.
*(Race)* *(Sex)*

I reside at 102 Berkshire Drive.
*(Number/Street)*

City of Jacksonville, County of Onslow.
State of NC, Zip Code 28546.

My telephone number is *(including area code)* (910) 353-8768.
My statement concerns Sears #2755 which is located at Country Club Rd.
*(Name of Union/Company/Agency)*

in Jacksonville NC 28546.
*(city)* *(State)* *(Zip)*

My job classification is (if applicable)
*(Job Title)*
My immediate supervisor is (if applicable) _____
*(Name)* *(Job rule)*

Preface: I first wrote letter dated July 25,1992 to the U.S. Dept. of Justice (civil Rights Division) concerning the fact that I believed I was being discriminated against at Sears because of my disabilities. I received a letter dated September 17,.1 992 from the U.S. Dept. of Justice advising that my correspondence was being forwarded to the U.S. EEOC for disposition. During this period I had 2 major multiple sclerosis attacks and was incapacitated. I never received a response form EEOC, therefore I sent another letter dated August 14, 1993 addressed to Christopher Bell, Acting Associate Legal Counsel/ADA Services - EEOC. In the letter I explained my situation at Sears and asked specific questions concerning my rights as a disabled employee. I received a letter dated October 4, 1994 from Peggy R. Mastroianni, Assistant Legal Counsel/ADA Policy Division. Ms. Mastroianni addressed the specific questions I asked concerning my situation and advised that if I believed I was being discriminated against that I should contact the Charlotte District Office. I telephoned the Charlotte Office and was referred to the Raleigh Area Office. I decided not to contact the Raleigh office because I am aware of other individuals who filed charges with that office and did not

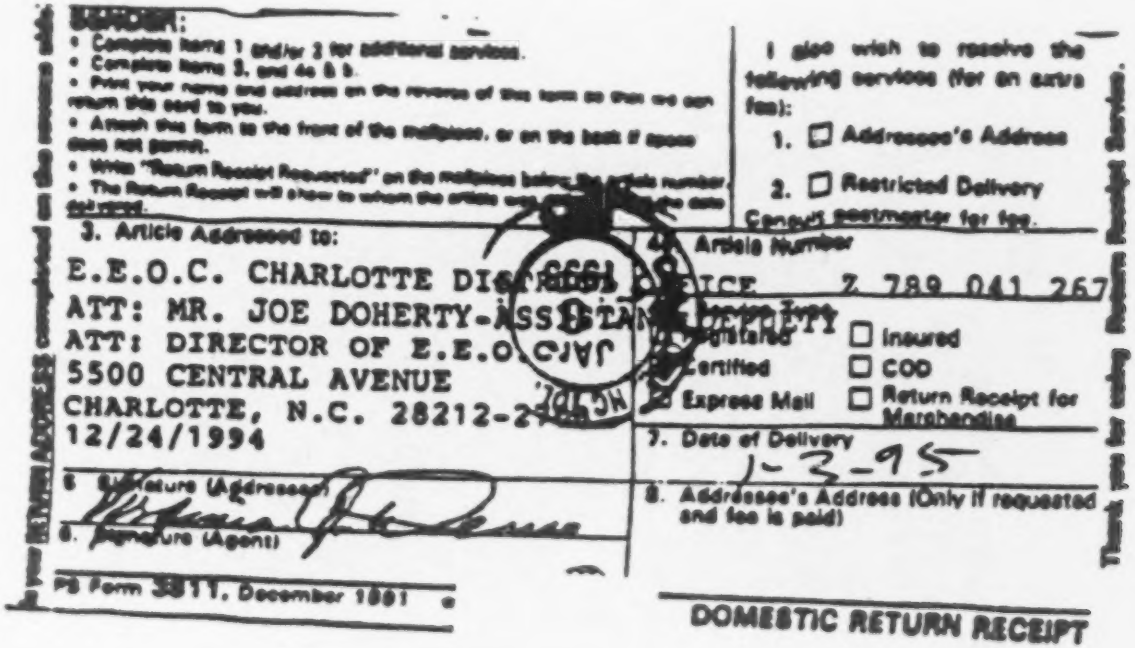
receive favorable outcomes. It is my contention that I contacted both the U.S. Dept.. of Justice and EEOC in a timely manner and that one of these two agencies should have followed through in processing my complaint.
/s/ SMP Page 1 of _____
(initials)

EEOC AFF-A (08-89)

Feb 7 09:08 1995 CP Initials _____ Chg # , Attachment

Class Harm - none.

There is harm! I want all people charged.
This I do not understad.
1) ADA - constantly violated!
2) Had to Take mental and verbal abuse.
3) Talked about from other employees.
4) There is more harm than I found **********
5) Justice Dpt. did do this job
6) The disability attorney never did his job
7) EEOC - couldn't get facts rights - You have this form and you can see what is means
8) All employee - management ***** do state ADA, why did it not be ******* at Sears.
9) Pain, suffering, constantly being ******threatening did always them in my *****.
10) I want all fines imposed on all I sent to you ******* - disabled, nothing and********



SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
E.E.O.C. CHARLOTTE DISTRICT OFFICE
ATT: MR. JOE DOHERTY-ASSISTANT DIRECTOR
ATT: DIRECTOR OF E.E.O.C./AJS
5500 CENTRAL AVENUE
CHARLOTTE, N.C. 28212-2[illegible]
12/24/1994

4. Article Number
Z 789 041 267

Type of Service:
- ☐ Registered
- ☐ Certified
- ☐ Express Mail
- ☐ Insured
- ☐ COD
- ☐ Return Receipt for Merchandise

7. Date of Delivery
1-3-95

5. Signature (Addressee)

6. Signature (Agent)

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1991

DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

BEST AVAILABLE COPY

Z 789 041 267

**Receipt for Certified Mail**

No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

| | |
|---|---|
| Postage | $ 0.0 |
| Certified Fee | 1.00 |
| Special Delivery Fee | |
| Restricted Delivery Fee | |
| Return Receipt Showing to Whom & Date Delivered | 1.00 |
| Return Receipt Showing to Whom, Date, and Address | |
| TOTAL Postage & Fees | $ 6.10 |
| Postmark or Date | |

JACKSONVILLE NC BRYAN BLVD

PS Form 3800, March 1993

UNITED STATES POSTAL SERVICE

0 704-567-7111
6 704-567-7100

Official Business

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE $300

E.E.O.C. CHARLOTTE DISTRICT OFFICE
ATT: MR. JOE DOHERTY-ASSISTANT DEPUETY
ATT: DIRECTOR OF E.E.O.C.
5500 CENTRAL AVENUE
CHARLOTTE, N.C. 28212-2708
111294

704-567-7111
704-567-7100

name, address and ZIP Code here

[illegible]ARON M. PLAIN
[illegible]ERKSHIRE DRIVE
[illegible]ONVILLE, N.C. 28546-8403

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Charlotte District Office

5500 Central Avenue
Charlotte, NC 28212
PH: (704) 547-7100
TDD: (704) 547-7173
FAX: (704) 547-7192

January 31, 1995

Ms. Sharon M. Plain
102 Berkshire Dr.
Jacksonville, NC 28546-8403

Dear Ms. Plain:

I regret that I am not always able to return your phone calls. Please believe that it is not from indifference on my part, nor from a lack of concern for any of the people who call upon us for assistance. My responsibilities must be fulfilled, however, and if I become personally involved in the individual tasks which are assigned to other members of our staff than other charging parties suffer because I don't get my own job done.

Ms. Buxton is the manager responsible for our charge intake. She is very experienced and has the resources to direct toward assuring your charge is drafted and docketed properly. This is a very important step as it lays the foundation for any investigation which may subsequently occur. I have spoken with her about your situation and she is fully prepared to take whatever steps are necessary to assure your complaint is processed properly.

I must tell you, Ms. Plain, that I admire your tenacity and your courage. I understand how difficult your situation

is and wish we could correct it immediately. The legal process, however, is not quick and I must ask for your continued patience as we process your charge. Be assured that we will do whatever is required to assure your rights are protected.

Sincerely,

/s/ Joseph P. Doherty
Joseph P. Doherty
Deputy Director

PLAIN V. SEARS, ROEBUCK & CO.
C. A. No. 7;95-CV-185-F1

PLAINTIFF'S MOTION OF OPPOSITION NOT TO DISMISS

**EXHIBIT B**

PLAINTIFF'S STATEMENT AND PAPER WORK OBTAINED BY PLAINTIFF FROM HER DISABILITY ATTONEY, NOT SIGNED BY STORE MANAGER.

PLAINTIFF REQUESTED FILES FROM LTD CLAIM TO BE SENT TO HER AND THEY WERE, SIGNED BY STORE MANAGER, AFTER PLAINTIFF QUESTIONED THIS DUE TO THE FACT THE ONES PLAINTIFF AND HER DISABILITY ATTORNEY WERE SENT WERE NOT SIGNED BY THE STORE MANAGER, WHO TOLD PLAINTIFF IT WAS, COPIES OF WHERE PLAINTIFF CALLED HER LTD COMPANY MET LIFE DISABILITY CLAIMS TO RECEIVE D THE FILES.

# CLAIMANT'S JOB DESCRIPTION

NAME : Sharon Plain

Was told by LoisWorrell she/Parker filled out
Didn't know what is on it

REGULAR TIMECARD PART-TIME REGULAR TIMECARD

CHECKLIST

JOB TITLE
Sales CoOrdinator - Non Commission

PRESENT ASSIGNMENT DATE
5-31-92

IF PART-TIME REGULAR
NUMBER OF DAYS WORKED PER WEEK PRIOR TO DISABILITY_____ NUMBER OF HOURS WORKED PER DAY PRIOR TO DISABILITY

CURRENT OCCUPATIONAL REQUIREMENT
Please check appropriate box to indicate current occupation requirements. When more than one exposure or activity is listed per line, cross out that which does not apply.

Exposure to: 0% /1-19% Working Day/ 20%-60% Working Day/ 60-100% Working Day

Dust/gas/fumes X

Chemicals/solvents X

Temperature extremes X/ in writing said that authoritive Brad Crsthal

| Required Activities: | 0%/1-19% Working Day/20%-60% Working Day/61%-100% Working Day | | |
|---|---|---|---|
| High noise levels | | X | |
| Allergenic agents | X | | |
| Enclosed spaces | X | | |
| Wet conditions | X | | |
| Reducing lighting levels | X | | |
| Electrical sources | X | | |
| Other | X | | |
| Explanation: | | | |
| Sitting | X | | |
| Standing | | | X |
| Walking | | | X |
| Climb stairs/ladder/scaffold | | | X |
| Balancing (Exposure to falling) | | | X |
| Cramped/unusual positions | | X | rearrange |
| Extended reach forward/overhead | | X | |

| Required Activities: | 0%/1-19% Working Day/20%-60% Working Day/61%-100% Working Day | |
|---|---|---|
| Push/pull/twist<br>Push, pull, twist | | X |
| Grasp/handle<br>grasp, handle | X | |
| Bend/stoop/squat<br>Bend, stoop/squat | | X |
| Fine hand dexterity | X | |
| Highly repetitive<br>Motion | X | |
| Forceful wrist<br>Twisting | X | |
| Operate truck/dolly/<br>Small vehicle Cart | X | 400 pc. tool set in drill |
| Operate heavy<br>Equipment | X | |
| Fine visual auditory<br>Attention | X | |
| Precise verbal/written<br>Communication | X | |
| Other | X | |

Explanation:

**Carrying & Lifting Requirements**

| Intensity In Pounds | Frequency<br>Never/Less 20% / 20%-60%/Greater 60% |
|---|---|
| 0-15 | X |
| 0-16 | X |
| 31-45 | X - water heater, tract |
| >45 | X - you pc tool tool bores<br>31/2 ton Jack 9 pc |

Explanation (if necessary):

Supervisory Functions (if applicable): Training, co-ordinating and directing efforts of sales associates in sales methods and customer support standards. Supports sales manager, performs miscellaneous duties as assigned.

Other Significant Factors of Comments: _____

| Douglas A. Turner | (910) 353-2223 | 3-15-94 |
|---|---|---|
| SIGNATURE OF UNIT MANAGER | | PRINT |
| NAME | TELEPHONE | DATE |

## TELEPHONE MEMORANDUM

Return File to: Sal
Drop In ☒ Rush
Call Received from: Sharon Plain
Phone #: (910) 353-8768
Call Made to:
Phone #: ( )
Firm and Group Number: Sears 31003
Employee: Sharon Plain
Claim Number: 94068400
Social Security Number: 243-11-2932
Please Return Call __ __Returned Your Call

**MESSAGE**

Ee said her attorney sent us SSDIB papers did we get them.

Also ee wants a copy of the Sears Plan sent to MR. She wants us to contact Sears. She does not want to call them.

Call Received/Made by: Sal
Date: 5/12/94 Time: 1:15

**REPLY**

Left message on Answering Machine. We did receive attorney letter and we contacted Sears about sending you a copy of the plan.

Call Returned by: Sal Date: 5/18/94
Time: 1020

## TELEPHONE MEMORANDUM

Return File to: _____ Drop In _
Rush __
Call Received from: Sharon Plain
Phone #: (910) 353-8768
Call Made to:
Phone #: ( )
Firm and Group Number: _____
Employee: Sharon Plain
Claim Number: 94068400
Social Security Number:

_ Please Return Call _Returned Your Call

**MESSAGE**

Ee called she wanted the Fax #
of Jamie Weaver she also wanted to
know when we Faxed the request for
a copy of the plan.

Ee also wants a copy of her
file. Told her I would call her back.

Call Received/Made by: Sal Date: 5/24/94
Time: 11:50

**REPLY**

She specifically wants a copy of her LTD application
package forms A-G.

Call Returned by: _____ Date:
Time:

TELECOMMUNICATIONS TRANSMITTAL
INSTRUCTIONS

DATE: 5/17/94

TO: ATTENTION OF: Jamie Weaver
DEPT OR ROOM: Sears Merchandise Group
CITY & STATE: Hoffman Estates IL
FAX NUMBER: 708-286-3697

The information contained in the following pages is confidential and intended only for the individual named above. **ANY OTHER USE, DISSEMINATION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED AND IS A TORTIOUS INTERFERENCE WITH OUR CONFIDENTIAL BUSINESS RELATIONSHIPS.** If this document was erroneously sent to you, please notify us immediately at the number listed below and then destroy this document.

FROM: Robert Gondek
DEPT: Sears
PHONE: 315-792-2470
FAX #: 315-792-2514

METROPOLITAN LIFE INSURANCE CO.
DISABILITY CLAIMS SECTION
COSBY MANOR ROAD
P.O. BOX 3043
UTICA, NY 13504-3043

NUMBER OF PAGES TO BE SENT: 1
(INCLUDING THIS PAGE)

Please send SPD to a:

Sharon Plain
102 Berkshire Dr.
Jacksonville, NC 28546
SS# 243-11-2932
Disab Date: 1-6-94

JOB TITLE PRESENT ASSIGNMENT
Sales CoOrdinator - Non Commission DATE 5-31-92

IF PART-TIME REGULAR
NUMBER OF DAYS WORKED PER WEEK PRIOR TO DISABILITY_____ NUMBER OF HOURS WORKED PER DAY PRIOR TO DISABILITY

CURRENT OCCUPATIONAL REQUIREMENT
Please check appropriate box to indicate current occupation requirements. When more than one exposure or activity is listed per line, cross out that which does not apply.

| Exposure To: | 0% | /1-19% Working Day | /20%-60% Working Day | //61%-100% Working Day |
|---|---|---|---|---|
| Dust/gas fumes | | | X | |
| Chemicals Solvents | | | X | |
| Temperature Extremes | | | X | |
| High noise Levels | | | X | |

| Exposure To: | 0% | 1-19% Working Day | 20%-60% Working Day | 61%-100% Working Day |
|---|---|---|---|---|
| Allergenic agents | X | | | |
| Enclosed Spaces | X | | | |
| Wet Conditions | X | | | |
| Reducing Lighting Levels | X | | | |
| Electrical Sources | X | | | |
| Other | X | | | |
| Explanation: | | | | |
| Sifting | | X | | |
| Standing | | | X | |
| Walking | | | X | |
| Climb stairs ladder/scaffold | | X | | |
| Balancing (Exposure to falling) | | X | | |
| Cramped unusual positions | X | | | |

## Carrying & Lifting Requirements

| Intensity In Pounds | Frequency | | | |
|---|---|---|---|---|
| | Never | Less Than 20% | 20%-60% | Greater Than 60% |
| 0-15 | | X | | |
| 16-30 | | X | | |
| 31-45 | X | | | |
| >45 | X | | | |

Explanation (if necessary):

Supervisory Functions (if applicable): Raining, coo-ordinating and directing efforts of sales associates in sales methods and customer support standards. Supports sales manager, performs miscellaneous duties as assigned.

Other Significant Factors of Comments:

| /s/ Douglas A. Turner | Douglas A. Turner |
|---|---|
| SIGNATURE OF UNIT MANAGER | PRINT NAME |
| (910) 353-2223 | 3-15-94 |
| TELEPHONE | DATE |

PLAIN V. SEARS, ROEBUCK & CO.
C.A. No. 7;95-CV-185-F1

PLAINTIFF'S MOTION OF OPPOSITION NOT TO DISMISS

**EXHIBIT C**

DATED LETTER OCTOBER 3, 1994, FROM ANTHONY RUCCI IN CHICAGO. PLAINTIFF ASKED MANY QUESTIONS, JOB GRADE WAS CHANGED TO SALES COORDINATOR WITHOUT KNOWLEDGE OR CONSENT.

PLAINTIFF DID FIND OUT JOB GRADE WAS CHANGED AND INVESTIGATED THE FACTS. PLAINTIFF REFUSED TO A JOB, PAY WISE DROP, PLAINTIFF FELL UNDER THE GRANDFATHERS ACT AND PLAINTIFF DID TELL THE STORE MANAGER WHO WAS THERE AT THAT TIME.

SEARS MERCHANDISE GROUP
3333 BEVERLY ROAD
HOFFMAN ESTATES, IL 60179

**ANTHONY J. RUCCI**
Executive Vice President
Administration
708-286-5711
Fax: 708-286-5039

October 3, 1994

Ms. Sharon Plain
102 Berkshire Drive
Jacksonville, NC 28546

Dear Ms. Plain:

Consistent with our earlier messages to each other, this letter represents a response to those questions which I now understand you have asked and would like a response to.

1. You would like to know why your job grade was reduced as a result of the 1992 restructuring, and you weren't told.

2. You would like to know why store personnel are communicating to others that you have decided to retire.

3. You would like to know about the level of reimbursement which our health care plan will provide on your wheelchair equipment.

4. You would like to know why individuals with disabilities, including yourself, have not been treated more respectfully.

5. You would like to understand why Sears requires such extensive review on associate health care expenses.

6. You would like a written response to your questions from Mr. Edward Brennan, Mr. Arthur Martinez and myself.

Listed below is the response to your questions:

1. You would like to know why your job grade was reduced as a result of the 1992 restructuring, and you weren't told.

The position you held as Sales Supervisor was eliminated in your store in the May 1992 restructuring. Your recollection is that you were not notified that your movement into the newly created Selling Coordinator position resulted in a job grade decrease.

Since there is no documentation relating to this specific communication, I have directed store personnel and payroll to permanently grandfather your job grade to the level 11 you held in your former Sales Supervisor role.

2. You would like to know why store personnel are communicating to others that you have decided to retire.

Unfortunately, I cannot verify that anyone within Sears has expressed verbally or in writing that you will be retiring. I can assure you, however, the until the formal resolution of your current leave of absence any comments by Sears associates are meaningless regarding your future status. I regret any confusion which possible comments may have created for you or others who know you.

3. You would like to know about the level of reimbursement which our health care plan will provide on your wheelchair equipment.

The level of reimbursement for your current wheelchair equipment, according to my understanding, is

consistent with what has been directed by your physician. However, please check with your physician. I have directed our benefits plan administrator to make arrangements to reimburse you for whatever wheelchair equipment your physician recommends, without additional third party review of that recommendation, under the normal terms of our plan coverage. What this means is that if your physician prescribed additional; wheelchair features, I have authorized coverage of those additional features. Please note that this exception to our normal process under IRS regulations may make such additional reimbursement a taxable income item to you, and would need to be included on your statement of taxable earnings. There is no discretion on our part about this tax issue; we must comply with such federal regulations or risk penalty by the IRS.

4. You would like to know why individuals with disabilities, including yourself, have not been treated more respectfully.

This is the most difficult question for me to address, since I'm not you, nor do I have any similar disability. I can assure you however, that the dignity of people has long been and still remains a fundamental value of our company. Mr. Brennan and Mr. Martinez are individuals I interact with regularly, and both these gentlemen embody respectful treatment of people.

They and I neither condone, nor will we tolerate, anything less.

If you or others have not received respectful treatment from others within Sears I regret that happening. By virtue of this letter to you, I am copying your store manager, district general manager and region vice-president and asking them to investigate your concern and take any appropriate action to assure that your future experiences are of the highest standard.

5. You would like to understand why Sears requires such extensive review on associate health care expenses.

Most major U.S. Companies have evolved to what is called "managed care" approaches in the face of health care cost inflation. Sears is no exception. For regular physician visits and standard procedures this approach is both simpler and less expensive for our associates and the company. For more complex cases it can sometimes result in delays or disagreement between equally skilled providers as to the appropriate clinical protocol and course of care. Unfortunately, it sounds as if you have experienced frustration in this regard. I apologize for that, but the increased scrutiny and review is part of the price we all pay as associates to attempt to hold down health care costs.

6. You would like a written response to your questions from Mr. Edward Brennan, Mr. Arthur Martinez and myself. I have attempted to respond to each of your questions and requests and trust that the actions I've directed above have been responsive. I am acting on behalf of Mr. Brennan and Mr. Martinez on your situation. Therefore, you will not receive a separate explanatory letter from those gentlemen. You will note, however, that I have copied both of them on this letter, and I will also discuss you situation with them at my next opportunity in the coming few weeks.

In closing, I hope that this correspondence addresses your questions. If it has not, or if I've omitted any issues, it is not out of any attempt to be evasive. Please notify me if I've missed something. All I would ask is that you pose your questions as simply and concisely as possible so that I'm able to track down answers quickly and accurately. In addition, Ms. Plain, please address any future communications, whether in writing or by phone, exclusively to me personally. By calling so many other Sears associates it has actually resulted in delaying a prompt response to you until I could communicate with all the other parties involved. The one exception to this request is for claims and appeals under Sears medical plan. Those must, by law, be directed to our plan administrator as outlined in the attached document on page six. I also feel compelled to request that you not contact Sears associates at their home residence.

In order to ensure prompt, reliable communications to you in the future, I have instructed all other internal contacts (except the Medical Plan Administrator) not to respond to any inquiries from you directly, but to immediately forward your inquiries to me. I believe this will result in a better service level to you.

I hope that this letter finds your medical condition improving. Please know that Mr. Brennan, Mr. Martinez and myself wish you the very best.

Sincerely,

/s/ Anthony J. Rucci

Rene this told me she would call me! and
Didn't so I called her!

To find out what was going on -- I have had
many people (customers) call me at home,
show up on my door step, and, they, still are while I am
out on a 1 year leave of absence
due to multiple sclerosis!

cc: Mr. Edward Brennan, Chairman/CEO
Mr. Arthur C. Martinez, Chairman/CEO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| SHARON MARIE PLAIN,<br><br>Plaintiff,<br><br>v.<br><br>SEARS, ROEBUCK AND CO.<br>Sears Tower<br>Chicago, Illinois 60684<br>and SEARS, Store 2755<br>Jacksonville, NC 28540<br><br>Defendants. | ) C.A. NO.<br>) 7:95-CV-185-<br>) F1 |

ENTERED: March 22, 1996

DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

## I. CASE BACKGROUND

Plaintiff filed this action on December 22, 1995, alleging that Defendant Sears, Roebuck and Co. discriminated against her in violation of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §12101, et seq. ("ADA") and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII"). Specifically, Plaintiff's Complaint alleges that Defendant violated the ADA by harassing her and terminating her employment. Plaintiff further alleges that Defendant

violated Title VII, based on Plaintiff's sex, by forcing her out of the Company's promotion pattern, denying her promotions that were awarded to men, and terminating her employment.

On February 1, 1996, Defendant filed its motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As part of its motion Defendant submitted matters outside the pleadings for the Court's consideration. Defendant specifically acknowledged that is motion "may be treated as a Motion for Summary Judgement where the Court relies on matters outside the pleadings." (Def.'s Mem. in Support of Mot. To Dismiss at 3 n.2.) Shortly thereafter, Plaintiff sought, and was granted, an extension of time to respond to Defendant's motion on the grounds that she needed additional time "to research various factual and leagal [sic] issues before [she] can submit an adequate response to Defendant's Motion>' (Pl.'s Mot. to Extend Time para. 3.) Plaintiff timely submitted her Motion in Opposition (Plaintiff's response_ and supporting materials on March 6, 1996.

Defendant now files its reply to Plaintiff's memorandum in opposition and contends that Plaintiff's response cannot defeat the motion to dismiss because it fails to dispute the material facts of the case. Defendant's reply will set forth the material facts which remain undisputed and address or reference its discussion of these legal issues involved in this case.

## II. FACTS

### A. Statement of Undisputed Materials Facts

For the purposes of this motion, Plaintiff's factual allegations will be considered as if they were true. Notably however, although Plaintiff has attempted to respond to Defendant's motion by presenting her own "facts," the following material facts remain undisputed:

1. Plaintiff alleges in her Complaint that on March 2, 1992, she "was subjected to harassment." (Compl. para. 11.) Plaintiff further alleges that on August 10, 1993, "Doug Turner, Store Manager, announced at a meeting to the other employees that Plaintiff would not be placed on a staff schedule due to health and her doctor's recommendation." (Compl. para. 12.)

2. Plaintiff states in her Complaint that she filed EEOC Charge No. 141950278 in February 1994. (Compl. para. 6) However, Plaintiff's only EEOC charge was "date-stamped" received by the Commission on February 13, 1995, not 1994. (Pl.'s Mem. in Opposition at 16; Attach. A to Def.'s Mot. Dismiss; EEOC Charge & Notice.) Even if Plaintiff had field her charge on February 13, 1994, it would still have been filed 187 days after the most recent alleged incident of discrimination.

3. Plaintiff was not actively employed by Defendant during the 180-day period preceding her February 13, 1995 Charge of Discrimination. NO incidents of alleged discrimination occurred during the 180-day period. Plaintiff's last day of active employment was on January 5, 1994, 404 days before she filed her EEOC charge. (Attach B to Def.'s Mot. To Dismiss, Aff. of Lois Worrell.)

4. Plaintiff's Complaint alleges that on April 28, 1995, she was "terminated...by failure to Defendant, Sears, to reasonably accommodate Plaintiff." (Compl. para. 17) No EEOC charge challenges Plaintiff's alleged April 28, 1995, termination of employment with Sears. In fact, Plaintiff does not allege that she was terminated until more than two months after she filed her single EEOC charge.

5. Plaintiff receives disability benefits from the Socials Security Administration and from the disability plan sponsored by Defendant because she is unable to work in any capacity. By accepting benefits, Plaintiff acknowledges that she "cannot do [her] job" and that "[she] cannot do any other job for which [she was] fit based on [her] education,

training or experience." (Ex. E of Attach. C to Def.'s Mot. To Dismiss, Letter of Benefits Approval.)

6. The Social Security Administration determined that Plaintiff has been disabled since January 5, 1994. (Ex. B of Attach. C to Def.'s Mot. to Dismiss, SSA Award Letter.) Plaintiff was approved for long term disability benefits under the Sears Group Long Term Disability Insurance Plan on March 30, 1994. (Ex. E. of Attach C to Def.'s Mot. to Dismiss, Letter of Benefits Approval.)

7. In her applications for disabilty benefits, Ms. Plain recited:

(a) that she "[c]annot see well enough to use register accurately; cannot stand for 8 hours" (Ex. C of Attach. C to Def.'s Mot. to Dismiss, Claimant's Statement of LTD Claim.);

(b) that her "hands are numb and arms become numb - cannot lift more than 10 pounds" (Ex. C of Attach. C to Def.'s Mot. to Dismiss);

(c) that she cannot perform the duties of some other job "...on a regular or reliable basis" (Ex. C of Attach. C. to Def.'s Mot. to Dismiss);

(d) that her "neurologist Dr. Ballenger had told [her that she] may never be able to work again" (Ex. C of Attach. C to Def.'s Mot. to Dismiss);

(e) that she is kept from working because of "Hurt/ache across back from neck downto lower back with intermittent sharp pains going up back like a knife; hips and legs hurt because gait is out of whack (the the hurt down the hips and legs is a tingling numbness); feet and hands are numb; even wearing clothes hurts at times; eyes blur and at times cannot distinguish letters, numbers and have difficulty with reading comprehension at times." (Ex. A of Attach. C to Def.'s Mot. to Dismiss, Social Security Disability Report.); and

(f) and that her "Neurologist told [her that she] was 100% disabled and should stop working" (Ex. A of Attach. C to Def.'s Mot. to Dismiss).

B. Plaintiff's Non-Material Allegations[5]

Plaintiff's response contains numerous allegations which do not relate to the issues it his case. Specifically, none of Plaintiff's responsive materials attempt to challenge the facts that (1) Plaintiff's only EEOC charge was not filed within 180 days of any alleged discriminatory conduct, (2) Plaintiff's EEOC charge does not challenge her April 28, 1995 termination form the Company, and (3) Plaintiff was not a qualified individual with a disability at the time that he employment was terminated.

## III. ARGUMENT AND AUTHORITIES

### A. Relationship Between Motions To Dismiss and Motions for Summary Judgement.

A Rule 12(b)(6) "Motion to Dismiss" is automatically converted into a "Motion for Summary Judgment" if the Court considers matters outside of the pleadings.[6]

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[5] Plaintiff has failed to produce any admissible evidence in response to Defendant's motion to dismiss. Regardless, Defendant will reply to Plaintiff's memorandum as if her attached material were admissible.

[6] Rule 12(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgement and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made.

B. Summary Judgment Standard.

Rule 56(c) of the Federal Rules of Civil Procedure mandates that summary judgment be granted where (1) there is no genuine issue of material fact, and (2) the moving party is entitled to judgment as a matter of law. The purpose of Rule 56(c) is to provide "a procedure with which to bypass a trial when the fact resolution process of trial would prove to be of no use in the disposition of the case." Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1315 (4th Cir. 1993). As stated in Mitchell,

> The Supreme Court has long held that judges are not "required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 1065 S.Ct. 2505, 1511, 91 L.Ed. 2d 202 (1986) (quoting Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L.Ed. 867 (1872).

Id., at 1316. "The summary judgment inquiry thus scrutinized the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof of his claim at trial." Id. "In short, the summary judgment procedure allows the Court to forecast the proof at trial to determine whether consequential facts are in dispute, and if not, to resolve the case without a trial." Id. (emphasis added). In the present case, the consequential facts described above are not in dispute.

B. Plaintiff Has Not Produced Evidence Disputing The Fact That She Did Not File Her Charge of Discrimination Within 180 Days of The Alleged Discrimination.

Defendant moved to dismiss Plaintiff's Complaint because Plaintiff failed to raise her allegations in a timely EEOC Charge of Discrimination. See Def.'s Mem. in Support of Mot. Dismiss at 4. Plaintiff argues in her memorandum, however, that she timely field her charge of Discrimination because the EEOC accepted and investigated her charge. Plaintiff's memorandum further suggests that she can proceed with her suit because the EEOC issued a "Notice of Right to Sue." Plaintiff then argues that she timely filed her lawsuit within 90 days of the receipt of her Right to Sue notice. However, none of Plaintiff's argument (even if these facts are true) are relevant to whether Plaintiff timely filed her Charge of Discrimination. See Def.'s Mem. in Support of Mot. to Dismiss at 4 (discussing requirement that charges of discrimination be field within 180 days of the alleged unlawful activity). The fact that the EEOC accepted and investigated a charge is irrelevant to whether the charge was timely filed. In fact, the EEOC's own regulations prohibit it from rejecting a Charge of Discrimination and further indicate that he jurisdictional issue of timeliness

"need not be decided before an investigation of the merits begins" (Section 605.1 of EEOC Compliance Manual, coy attached as Exhibit A.) Finally the fact that the EEOC issued a standard "Dismissal and Notice of Rights' form explaining the Plaintiff would lose her right to sue if she did not file suit within 90 days does not establish that Plaintiff's underlying charge was timely filed.

In summary, the date of the alleged unlawful conduct and the single EEOC charge are identified on the face of the charge and the Plaintiff's Complaint. See Def.'s Mem. in Support of Mot. to Dismiss at 2-3 (discussing relevant dates). In deed, the Plaintiff's own factual allegations further show that none of Defendant's alleged discriminatory conduct was made the subject of a timely filed Charge of Discrimination because Plantiff was not actively employed during the 404 days preceding her Charge of Discriminaton. These facts cannot be chagned. Moreover, the law is clear -- Plaintiff's Complaint shoudl be dismissed if it is not supported by a timely Charge of Discrimination. See, e.g., Hamilton v. 1st Source Bank, 928 F.2d 86, 90 (4th Cir. 1990)(remanding discrimination case with instructions to dismiss as untimely); Def's Mem, in Support of Mot. to Dismiss at 4-5.

C. It Is Undisputed That Plaintiff Did Not Challenge Her Alleged April 1995 Termination From The Company in Her EEOC Charge of Discrimination.

Defendant also moved to dismiss Plaintiff's termination allegation because it was never raised in a timely EEOC Charge of Discrimination. See Def.'s Mem. in Support of Mot. to Dismiss at 3. However, Plaintiff has produced no evidence or argument suggesting that she challenged her termination from the Company in her single EEOC Charge of Discrimination. Accordingly, Plaintiff's allegation that she was unlawfully terminated should be dismissed.

D. It Is Undisputed that Plaintiff Was Not a Qualified Individual With a Disability at the Time of Her Separation From the Company.

Defendant also moved to dismiss Plaintiff's claims alleging that she was terminated in violation of the ADA and Title VII. As a matter of law, Plaintiff cannot be qualified to perform the essential function of her job is she is receiving disability benefits based on her inability to perform work in any capacity. See Def.'s Mem. in Support of Mot. to Dismiss at 5-7.[7] Plaintiff has proffered no argument challenging this correct legal analysis. Accordingly, Plaintiff's challenge to her termination from the Company is subject to dismissal for this reason as well.

III. CONCLUSION

Plaintiff's claims should be dismissed because the record evidence demonstrates that Plaintiff has failed to comply with the administrative prerequisites for claims arising under Title VII and the ADA, and that a matter of law, Plaintiff was not a qualified individual with a disability at the time that her employment was terminated. Accordingly, Defendant respectfully requests that its motion to dismiss be granted.

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[7]In support of its motion, Defendant relies on this Court's ruling in Reigel v. Kaiser Foundation Health Plan, 859 F. Supp. 963 (E.D.N.C. 1994) for the proposition that a plaintiff cannot contradict her previous statement, made for the purpose of securing disability benefits, regarding her inability to work. See Def.'s Mem. in Support of Mot. to Dismiss at 5-6. A number of courts throughout this country have cited Reigel with approval in reaching the same conclusion. See, e.g., Berry v. Norfolk Southern Corp., 1995 U.S. Dist. LEXIS 10215 (W.D. Va. June 23, 1995)(plaintiff precluded from contradicting representations made in application for disability benefits)(copy attached as Exhibit B); Reiff v. Interim Personnel, 906 F.Supp. 1280 (D. Minn. 1995)(same).

Dated this the 21st day of March, 1996.

Respectfully submitted,

/s/James B. Spears, Jr.
James B. Spears, Jr.
N.C. State Bar #05843

/s/Aaron M. Christensen
Aaron M. Christensen
N.C. State Bar #21663

HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.
Federal Plaza Building
400 West Trade Street
Charlotte, NC 28202
(704) 342-2588

*Counsel for Sears, Roebuck & Company*

CERTIFICATE OF SERVICE

I, Gloria Knotts, do hereby certify that I have this day served a copy of the within and foregoing **Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion To Dismiss** by placing a copy of same in the United States Mail, properly addressed and with the correct amount of postage affixed thereto, to the following person:

Sharon M. Plain, Pro Se
102 Berkshire Drive
Jacksonville, NC 28546-8403

Dated this the 21st day of March, 1996.

Respectfully submitted,

HAYNESWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.

By: /s/ Gloria Knotts

Gloria Knotts
Legal Secretary
Federal Building
300 West Trade Street
Charlotte, North Carolina 28202
(704) 342-2588

Sharon Marie Plain v. Sears, Roebuck and Co., et al.
C.A. No. 7:95-CV-185-F1

**EXHIBIT A**

**SECTION 605.1 OF EEOC COMPLIANCE MANUAL**

No. 91 TITLE VII JURISDICTION 605:0001

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SECTION 605
TITLE VII JURISDICTION

605.1 Introduction - This section describes the range and extent of the Commission's authority to accept, investigate, and resolve charges of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, and provides guidance on how to investigate various jurisdictional issues. Section 605 is not fully applicable to systemic Commissioner charges, with respect to standing (§605.3) and deferral requirements (§605.5). Section 16 of the Compliance Manual should be followed when proposingand deferring systemic Commissioner charges.

The Equal Employment Opportunity Commission was created by Title VII and most of its authority is derived from that Act. Title VII defines employment discrimination and describes the types of employers, employees, employment agencies, and labor organization which are covered by the Act. It also describes who may file charges of discrimination and the time frame within which they must do so. These are all jurisdictional issues.

The issue of whether the Commission has jurisdiction over a charge must be addressed initially in every case at the intake stage of the investigation. The Commission has no jurisdiction may be called into question at the intake stage, however, in may instances the jurisdictional issue cannot be resolved at that stage because additional information is

needed to determine whether the Commission has jurisdiction over a charge. If an EOS is uncertain about whether the Commission has jurisdiction, the charge must nevertheless be accepted. Charges which are determined to be non-jurisdictional will subsequently be dismissed. Even if the intake EOS believes that the Commission does not have jurisdiction over a charge, (s)he may not reject the charge if the potential charging party insists on filing it. The Commission has an obligation to accept charges of discrimination. An EOS may only advise or counsel a potential charging party not to file a charge in those situations where there is clearly no jurisdiction. Prior to making such determinations, the EOS should consult with his/her supervisor and/or the legal unit in the district office.

A determination on the jurisdictional issue will be made before a determination on the merits of the charge is made, however, the jurisdictional issue need not be decided before an investigation of the merits begins. The EOS should consult with his/her supervisor in determining whether to proceed with an investigation of charging party's allegations before the jurisdictional issue is resolved.

605.2 Basis and Issue of the Charge - The first thing the EOS must determine is whether the basis of the charge, and the issue(s) raised by the charging party are one that the Commission has the authority to investigate. The commission has the authority to investigate only those charges of employment discrimination which allege that the charging party was discriminated against on the basis of race, color, religion, sex, national origin, and retaliation §704(a)(basis), in a certain specific manner, e.g., failure to hire, promote, etc. (issue). If an individual is not complaining of employment discrimination, or the basis is not one of those indicated above, the EOS should advise the individual that the Commission does not have jurisdiction over his/her allegation and refer him/her to another agency, if appropriate. 1/ If the individual insists on filing a charge,

the charge must be accepted and immediately dismissed in accordance with §4 of the Compliance Manual.

Example 1 - During the pre-charge counseling period, the CP, a Black, alleges that a landlord refused to rent an apartment to him because of his race.

Sharon Marie Plain v. Sears, Roebuck and Co., et al.
C.A. No. 7:95-CV-185-F1

**EXHIBIT B**

**BERRY V. NORFOLK SOUTHERN CORP.
1995 U. S. DIST. LEXIS 10215**

[1995 U. S. Dist. LEXIS 10215]

MRS. H. C. BERRY as Executrix of the Estate of Haskell C. Berry, Plaintiff, v. NORFOLK SOUTHERN CORP., Defendant.

Civil Action No. 94-0075-R

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION

1995 U.S. Dist. LEXIS 10215

June 23, 1995, FILED, ENTERED

JUDGES: [1995 U.S. Dist. LEXIS 10215, *1] Jackson L. Kiser, Chief United States District Judge

OPINION BY:Jackson L. Kiser

OPINION:MEMORANDUM OPINION

By: Jackson L. Kiser, Chief Judge

United States District Court

This case is before the Court on the defendant's second summary judgment motion the Court having

previously denied a similar motion. See Berry v. Norfolk Southern Corp., No. 94-75-R, (W.D. Va. October 27, 1994)(hereinafter Berry I). Also pending is defendant's motion in limine. For the reasons stated below, the second summary judgement motion is well-taken and will be granted. The motion in limine is therefore moot.

FACTS:

The facts set forth in Berry I have not changed and I will not, therefore, recount them her. The new facts that justify the second motion revolve around the conduct of Haskell C. Berry ("Berry") in seeking disability benefits from the Railroad Retirement Board ("RRB"). Berry sought benefits from the RRB in December 1992, after the time Dr. Stewart had certified that Berry was able to return to work. In the pertinent part, the RRB documents contain Berry's statement that his job required him to walk for an average of one hour a day and to stand for an average of two hours per day. [1995 U.S. Dist. LEXIS 10215, *2] Def. Reply Mem. Ex. 4 at 3. The affidavit of Carolyn Jackson, A RRB official, indicates that Berry applied for "total and permanent disability," thus signifying that he was disabled from any job whatsoever. Berry signed an application for benefits that specifically warned of the penalties for a false or fraudulent statement. Jackson noted that when Berry cam in to apply for benefits, only a few days after Dr. Stewart returned Berry to work, she observed Berry to be "very sickly looking."

On March 17, 1993, the RRB requested a "Supplemental Doctor's Statement" to confirm availability of benefits. That document was completed by Lewis-Gale Clinic, where Dr. Stewart practices. It stated that Berry was not able to work in his last occupation. Def. Ex. 5. This document was apparently signed for Dr. Stewart and Dr. Blevins, another practitioner Dr. Stewart associated to work on Berry's condition, by an individual with the initials "BW" or "SW." While plaintiff claimed at the bearing on this

motion that the fact that the doctors did not personally sign this statement vitiated its binding effect, there is no evidence in the record to suggest that "BW" or "SW" lacked the authority to sign [1995 U.S. Dist. LEXIS 10215, *3] for the doctors. Berry ultimately received over $88,000 from the RRB and the defendant.

Another new fact is that Berry died on January 29, 1995. Dr. Stewart attributes the death to respiratory failure. This failure was caused by an infection that Berry was more susceptible to because of his tuberculosis and chronic obstructive pulmonary disease. Dr. Salb (the company doctor) testified in his deposition in January 1995 that he did not return Berry to work because he feared that if Berry caught a cold or the flu, he may not be able to recover. Dr. Salb also made reference to this factor during the EEOC investigation of Berry's charge.

DISCUSSION:

To maintain a claim under the Americans with Disabilities Act, plaintiff must prove that Berry was a qualified individual. 42 U.S.C.A. §12112(a)(West Supp. 1995). Berry's representations to the RRB regarding his disability preclude the assertion in this action that he is an otherwise qualified individual. See August v. Offices Unlimited, Inc., 981 F.2d 576, 581-83 (1st Cir. 1992); Reigel v. Kaiser Found. Health Plan of N.C., 859 F. Supp. 963, 969-70 (E.D.N.C. 1994); Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. [1995 U.S. Dist. LEXIS 10215, *4] 547, 555 (D. Kan. 1995). Cf. Grubbs v. Medical Facilities of Am., Inc., 879 F. Supp. 588, 590 (W.D. Va. 1995)(Kiser, C.J.)(holding that nursing home resident was not otherwise qualified for admission to particular home after admitting that she required type of care not offered in that home); Lowery v. Stovall, 92-0004-D (W.D.Va. February 8, 1995)(Kiser, C.J.)(appeal filed)(holding that plaintiff was judicially

estopped by statement made during course of guilty plea hearing).

Contrary to plaintiff's suggestion, this issue was not resolved in Berry I. Plaintiff relies primarily upon footnote 1 of that opinion, distinguishing the Reigel decision. Initially, I would note, as does the defendant, that there was no way of knowing the extent of Berrys' statement to the RRB until this motion. The Evidence in this motion was not before the Court at this time. The new evidence justifies summary judgement. While Dr. Stewart's November 1992 letter to the RRB distinguished between manual labor and other labor, Berry did not present that distinction when applying for benefits. The Supplemental Doctor's Statement also did not make a distinction between "desk work" and manual [1995 U.S. Dist. LEXIS 10215, *5] labor. the form Berry signed at the RRB imposed on him a duty to notify the RRB if his condition changed. Berry never informed the RRB of the distinction between "desk work" and manual labor. Even if Berry was forced into applying for disability benefits, Berry was not "forced" to apply for "total and permanent disability" at the same time that he now asserts he could do "desk work." On this motion, contrary to Berry I, I cannot accept Berry's explanation of this aspect of his case.

Not only does the representation to the RRB estop Berry from asserting a disability act claim, it also estops him from asserting an age discrimination claim. Berry asserted that he was discriminated against on the basis of age when defendant refused to take Berry back form his disability leave. To prove this case, Berry would have to make a prima facie showing, one element being that eh was qualified for the position. Cf. Alvarado v. Board of Trustees of Montgomery Community College, 928 F. 2d 118, 121 (4th Cir. 1991)(Title VII claim).[8] Given Berry's statement under

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[8] This would be an element whether Berry's claim was construed as a failure-to-hire claim or a discharge claim. Alvarado, 928 F.2d at 122.

oath to the RRB that he was completely disabled, Berry may not also maintain that he was qualified to return to work. See August, [1995 U.S. Dist. LEXIS 10215, *6] 981 F.2d at 581-83; Reigel, 859 F.Supp. at 970; Grubbs, 879 F.Supp. at 590. Indeed the ability of Berry to return to work was the basis for denying defendant's first motion for summary judgement. See Berry I, slip op. at 12-13. This basis has now evaporated, making summary judgment appropriate.

CONCLUSION:

For the reasons discussed above, the defendant's motion for summary judgment is granted. This disposition renders other motions moot. An appropriate order will be entered.

Jackson L. Kiser
Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:95-CV-185-F1

| | |
|---|---|
| SHARON MARIE PLAIN, Plaintiff, | )FILED<br>)MAR 27 '96<br>) |
| | )O R D E R |
| DAVID W. DANIEL, CLERK | ) |
| v. | )<br>)<br>)UNITED STATES<br>)DISTRICT COURT<br>) E.D. OF N. CAR. |
| SEARS, ROEBUCK & CO., and SEARS Store 2755, Defendants. | )<br>)<br>) |

ENTERED: March 26, 1996

Plaintiff, a pro so litigant, filed a Complaint on December 22, 1995, alleging that the defendants had discriminated against her in violation of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12101, et seq., and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, et seq. The plaintiff also has alleged that the defendants discriminated against her because of her sex, in violation of Title VII.

The court has reviewed the entire file on this case, including the parties' motions, responses and reply. For the reasons set forth in the defendants' Memorandum in Support of Motion to Dismiss[9] and in their Reply to the plaintiff's

[9] Because the court has considered materials outside the pleadings as submitted by the parties, this motion is treated as one for summary judgment pursuant to Rule 12(b), Fed. R. Civ. P.

Response, the defendants' Motion is ALLOWED, this matter is DISMISSED, and the Clerk of Court is DIRECTED to enter judgment for the defendants.[10] The only incident of alleged sex discrimination contained in the Complaint or in the EEOC charge is that, in March 1992, she was passed-over for a promotion because she was female. Her EEOC Charge, stamped received by EEOC's Charlotte Division Office on February 13, 1995, was not filed within 180 days of such incident, as expressly required by Congress. E.g., Hamilton v. 1st Source Bank, 928 F.2d 86, 90 (4th Cir. 199)(en banc); Stafford v. Radford Community Hospital, 908 F.Supp. 1369, 1374 (W.D. Va. 1995).

SO ORDERED.
This 26th day of March, 1996.

/s/ James C. Fox
James C. Fox
United States District Judge

I, certify the foregoing to be a true and correct
copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina

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[10] Even if the plaintiff had filed timely pleadings with the EEOC which were correct and complete in every way, the fact that she has established her complete disability and is receiving disability benefits precludes her, as a matter of law, from establishing that she is a "qualified individual with a disability" under the ADA. E.g., Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 970 (E.D.N.C. 1994); accord Williams v. Avnet, Inc., 910 F.Supp. 1124, 1132 (E.D.N.C. 1995).

/s/ Susan K. Dixon
Deputy Clerk

AO 450 (Rev. 5/85)

# UNITED STATES DISTRICT COURT

## EASTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| SHARON MARIE PLAIN,<br>Plaintiff, | ) | |
| v. | ) | JUDGMENT IN A CIVIL CASE |
| | ) | CASE NO. 7-95-CV-185-F1 |
| SEARS, ROEBUCK & CO., and SEARS Store 2755,<br>Defendants. | ) | FILED<br>MAR 27 '96 |

DAVID W. DANIEL, CLERK
U. S. DISTRICT COURT
E.D. OF N. CAR.

ENTERED: March 27, 1996

**Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss is ALLOWED, this matter is hereby DISMISSED.

THE ABOVE JUDGMENT WAS ENTERED
TODAY, March 27, 1996,

AND A COPY MAILED TO:

Aaron M. Christensen, Esq.
James B. Spears Jr., Esq.
Haynsworth, Baldwin, Johnson & Greaves
400 W. Trade Street
Federal Plaza Bldg.
Charlotte, NC 28202

Sharon Marie Plain
102 Berkshire Drive
Jacksonville, NC 28546-8403

March 27, 1996
Date

DAVID W. DANIEL
Clerk

(By)
/s/ Susan K. Dixon
Wilmington, North Carolina
Deputy Clerk